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No. 249

In the

Supreme Court of the United States

OCTOBER TERM, 1970

SCHMERLER FORD, INC., ET AL.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (AND APPENDIX)

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No.

SCHMERLER FORD, INC., ET AL.,

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Schmerler Ford, Inc., Jim Aikey Ford, Inc., Allegra Ford, Inc., Allen Chevrolet, Inc., Bergl Chevrolet Sales, Inc., Fergus Ford, Inc., Charles R. Hearn, Inc., MacKaye Motors, Inc., McAnary Ford, Inc., Mont Clare Motors Sales, Inc., Nielsen Chevrolet, Inc., Oak Park Dodge, Inc., O'Connell Chev., Inc., Jack O'Donnell Chevrolet, Inc., George C. Poole, Inc., Suburban Buick Co., Inc., Thompson Chevrolet, Inc., Bartell Motor Company, Inc., Norwood Motors, Inc., West Gate, Lincoln-Mercury, Inc., Ridge Motors, Inc., Scudder Buick, Inc., Nelsen-Hirschberg, Inc., and Z. Frank Chevrolet Co., pray that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Seventh Circuit herein (appearing at p. 1a of the Appendix hereto) enforcing an order

of the National Labor Relations Board that petitioner automobile dealers bargain with American Federation of professional Salesmen as representative of their salesmen.

Opinions Below

1. The decision of the Regional Director for the Thirteenth Region of the National Labor Relations Board in Sec. 9 (representation proceedings) overruling employer protests that an election not to be held because the union was organizing to engage in price fixing and holding (a) that the Union proposed a program of price fixing for retail sales of automobiles in order to guarantee labor benefits and a 3% net entrepreneurial profit, but (b) that the Board was not empowered to pass judgment as to whether the price fixing plan violated the anti-trust laws, and (c) ordering elections to proceed, is not reported. It appears at p. 2a of the Appendix hereto.

2. Material portions of the Employers' Petition for Review of the Regional Decision appear at p. 9a of the Appendix hereto.

3. The decision of the National Labor Relations Board denying Petition for Review of the Regional Director's decision because the Petition, according to the Board, raised no substantial issues is not reported. It appears at p. 18a of the Appendix hereto.

4. The decision of the Trial Examiner in Sec. 10 (unfair practice) proceedings after Petitioners refused to bargain with the union and holding that the employers' antitrust contentions had been rejected by the Board in the representation proceedings is not yet officially reported. Material portions of it appear at p. 18a of the Appendix hereto.

5. The decision of the National Labor Relations Board (175 N.L.R.B. No. 90) adopting the decision of the Trial Examiner and ordering Petitioners to bargain is not yet officially reported. It appears at p. 32a of the Appendix hereto.

6. The three opinions of the Judges of the Court of Appeals, each taking a different position, are not yet officially reported and appear at p. 33a of the Appendix hereto. Two of the Judges (Fairchild and Hastings) held that the union's scheme was illegal and that the Board was under a duty to consider that fact, but two Judges (Cummings and Fairchild) nevertheless held that the Board's order that the employers bargain should be enforced, although one of them (Fairchild) said that it is "implicit, without express modification" of the Board order that the employers need not bargain on price fixing. Judge Hastings, dissenting, held that it "was a clear abuse of discretion for the Board to permit the elections to proceed without taking any steps to insure that the free choice of the employees was not distorted by the proposed illegal pricing scheme."

Jurisdiction

The judgment of the Court of Appeals (p. 1a; *infra*) was entered May 13, 1970. Jurisdiction of this Court is involved under 28 U.S.C. 1254(1).

Questions Presented

1. May the Labor Board properly conduct representation proceedings after it finds that employees have been solicited for union membership under a program by which the petitioning union proposes to achieve labor benefits through a retail price fixing scheme blatantly obnoxious to the Sherman Act?

2. May the Labor Board, which regularly sets aside elections tainted by fraudulent employer or union cam-

paign propaganda which impinges upon "laboratory" election conditions, refuse to pass upon the legality of a union campaign pledge to seek a contract with employers which would achieve employer profits and labor benefits through a retail price fixing scheme?

3. May the secrecy of Labor Board ballots be invaded by post-election interrogations of employees as to how and why they voted so that direct proof may be made that an illegal promise "*won the election for the union*", or must the validity of Labor Board elections be determined by the present test of whether the conduct or propaganda under consideration "reasonably tended" to interfere with a free choice of representations?

4. Where the Labor Board, in representation proceedings and in ensuing unfair labor practice proceedings, has refused to determine whether an election promise to engage in price fixing with employers was illegal, and has made no finding as to whether the promise influenced the results of the election, may a Court of Appeals hold that, even though the election promise was illegal, it did not influence the results of the election?

5. Is an employer barred from asserting in a Labor Board proceeding that his employees were misled or defrauded by false and illegal election promises by a union?

Statutes Involved

NATIONAL LABOR RELATIONS ACT, 61 Stat. 136, 29 U.S.C. § 151, *et seq.* Pertinent provisions are printed at p. 46a of the Appendix hereto.

SHERMAN ACT, 26 Stat. 209, 15 U.S.C. § 1, *et seq.* Pertinent provisions are printed at p. 48a of the Appendix hereto.

Statement of the Case

Despite the three divergent views of the judges of the Court of Appeals as to the law, there are no material questions of fact:

In the fall of 1967 one Merlin Griffith and others who had been trying since 1961 to unionize retail automobile salesmen in the Chicago area, secured an organizing charter from the Communications Workers of America (AFL-CIO), and commenced a new drive. They met with little success, and some time in January, 1968, the Communications Workers announced it would withdraw the organizing charter, which it officially did as of January 31, 1968.

Meantime, on January 28, 1968, the independent organizers held a mass meeting and announced that they would continue the campaign; that competitive conditions in the automobile business were too arduous; that they proposed to obtain higher commissions and other benefits for salesmen under a scheme by which automobiles could not be sold below minimum prices fixed by a formula which would add to the wholesale price of a car allowances for salesmen's commissions, union dues and welfare, various percentages for the dealer's costs of doing business, plus 3% for the dealer's "Net" profit; that no salesman would be permitted to sell a car below prices arrived at by this formula. The dissenting opinion shows that this new program, promising profits to the dealers and commission increases to the salesmen, was dramatically effective. By March 12, 1968 the union had some 73 petitions for representation proceedings under Section 9 of the Act on file with the Thirteenth Regional Office of the National Labor Relations Board, *i.e.*, had secured membership applications from 30% or more of the salesmen in each

of 73 or more dealerships in the Chicago Metropolitan Area.

The numerous representation cases were consolidated into three groups for hearings. The principal hearing was held March 12-15, 1968. The record on the anti-trust contention now at bar was made at that hearing and incorporated in the subsequent hearings. The Hearing Officer refused to let the Employers prove approximately how many employees were present at the January 28 meeting at which the scheme was explained to prove how many or what proportion of membership applications were obtained at or after the price fixing scheme was announced. (App. 54a).

On April 30, 1968 the Regional Director issued his decision directing elections and holding that he was not empowered to pass upon the legality of the price-fixing scheme (App. 2a). Timely Petitions for Review were filed with the Board (App. 9a). The Petitions said the Employers proposed, through lawful publicity, to tell the employees that the Union's program was illegal but expressed doubt that their publicity would do much good because the employees were "entitled to assume the Board would not permit an election to be held, much less certify a union * * * if the union's program was to engage in a criminal conspiracy," *i.e.*, that the Employer's claim of illegality would carry little weight in view of the Regional Director's action. The Petition prayed that the representation petitions be dismissed or alternatively that the elections be postponed until the union submitted proof that it had abandoned its scheme. The union filed no denial of the averments of the Petition for Review nor did it renounce the price-fixing scheme.

Review was denied May 17, 1968. Most of the elections were held May 26-27, 1968. The union won 24 and was

certified at such dealerships (App. 28a). Since there is no direct judicial review of Section 9 proceedings, the dealers refused to bargain. So-called technical refusal to bargain cases were then instituted under Section 10 and consolidated for hearing. The Employers advanced their contention that it would not, because of the price fixing scheme; effectuate the purposes of the Act to enforce the certifications. The Trial Examiner held that the Employers' position in the unfair practice proceedings was "the very position which was advanced to and rejected by the Board in the representation proceedings" (App. 24a). He made no independent examination of the merits of the Employers' anti-trust defense but simply denied it. The Board, upon exceptions to the Trial Examiner's decision, made no independent anlaysis of the anti-trust contention but simply adopted "the findings, conclusions and recommendations" of the Trial Examiner and ordered the Employers to bargain (App. 29a). The Court of Appeals proceedings followed.

Reasons Relied on for Allowance of the Writ

The principle promulgated by this case is that a union may illegally promise to achieve economic benefits through product price fixing; that the Labor Board may ignore the illegal promise despite its duty to conduct elections, so nearly as possible, under "laboratory conditions"[1] and go on to certify the union as bargaining agent if it wins. This merits examination.

Moreover, the lead and concurring opinions abandon the principle uniformly established by the Board and every circuit that has considered the matter, that an election

[1] Many cases as to the "laboratory conditions" standard are reviewed and classified in *Home Town Foods, Inc.*, v. *N.L.R.B.*, 416 F. 2d 392 (5 Cir., 1969). The 7th Circuit has, until this case, enforced "laboratory conditions" (*N.L.R.B.* v. *Realist, Inc.*, 328 F. 2d 840, 843, 7 Cir., 1964).

should be set aside where a participant has engaged in improper conduct or propaganda that, in objective experience, "*reasonably tends*" to interfere with a free and untainted choice; the opinions promulgate a new principle, *i.e.*, that the complaining party must show as a fact that the improper element "*won the election*"—a standard that could be met only by interrogation of employees as to how they voted and why. Such inquiry heretofore has uniformly been condemned.

Additionally, implicit in the concurring opinion is the novel doctrine that only employees, not employers, may complain of fraudulent election propaganda addressed to employees.

Finally, although the concurring opinion is in agreement with the dissent that "the board and its officers had a duty to recognize" that the union's proposal was illegal, it nevertheless joins the lead opinion in ignoring or approving disregard of that duty, thus depriving the Employers of meaningful judicial review.

The present decision will invite administrative disregard of duty and endless fraudulent or illegal promises in Labor Board election campaigns. Because the decision will greatly unsettle the law as to permissible campaign tactics and because this Court has never pronounced the law on that subject in comprehensive fashion *certiorari* should be granted. Even if the Employers here are wrong and the law is to be that the Labor Board may lend its facilities for incubation of a conspiracy to commit crime, the Board should receive the permission of this Court, rather than merely that of one of the Circuits, so to do.

1-2. *It was an abuse of its jurisdiction for the Board to allow its processes to be used on behalf of a labor*

organization soliciting memberships and votes in an election on the ground that it would engage in price-fixing. It is a matter of grave concern whether the Board properly may lend its facilities to assist in an opening and necessary step of a price-fixing scheme, *i.e.*, elevating the price-fixing union to the status of certified bargaining agent. This Court has long been concerned with the interaction of labor laws and the antitrust statutes (*U.S.* v. *Brims*, 272 U.S. 549 (1925); *Local 167* v. *United States*, 291 U.S. 293 (1934); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940); *United States* v. *Hutcheson*, 312 U.S. 219 (1940); *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797 (1945); *Brotherhood of Carpenters* v. *United States*, 330 U.S. 393 (1947); *United States* v. *Employing Plasterers Association*, 374 U.S. 186 (1954); *United States* v. *Employing Lathers Association*, 347 U.S. 198 (1954); *International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283 (1959); *United Mineworkers* v. *Pennington*, 381 U.S. 657 (1965); *Meatcutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965); *American Federation of Musicians* v. *Carroll*, 391 U.S. 99 (1968)). Those cases make it clear that a combination of labor and management to fix prices and profits is a federal crime. Yet the Board refused to face that fact.

It should have, because the Board "has wide discretion to place appropriate limitations on the choice of bargaining representatives, should it be that public or statutory policies so dictate" (*N.L.R.B.* v. *Jones & Laughlin Steel Corporation*, 331 U.S. 416, 422 (1947). Thus the Board has refused to lend its facilities in Section 9 proceedings where the union was in business competition with the employer (*Bausch & Lamb Optical Co.*, 108 N.L.R.B. 1555 (1954)), or was fronting for a labor organi-

zation which could not qualify as a representative (*Iowa Packing Co.*, 125 N.L.R.B. 1408 (1959)), or had been organized or aided by supervisors but wished to represent non-supervisor employees (*Alaska Salmon Industry*, 78 N.L.R.B. 185 (1948), *American District Telegraph Co.*, 89 N.L.R.B. 1635 (1950)); or wished to represent employees of a local union which was a sister local of the same international (*General Teamsters etc., Local 249*, 139 N.L.R.B. 605 (1962)). And the Board will rescind certification if a union engages in racial discrimination (*Carter Mfg. Co.*, 59 N.L.R.B. 804 (1944)). But here the Board shut its eyes to the fact that employees were being solicited by the union to commit federal crime. The Board's denial of the Employer' anti-trust contention was a defiance of this Court's admonition that it may not effectuate the purposes of the Labor Act "so single-mindedly that it may ignore other and equally important Congressional objectives" (*Southern S.S. Co.* v. *N.L.R.B.*, 316 U.S. 31, 47 (1942)).

Decency in administrative procedure and respect for the strong federal policy against labor-management price-fixing suggest that this Court should review this case and tell the Labor Board firmly that it must recognize the Sherman Act in an effective manner.

Despite quibbles in the lead and concurring opinions to the effect that employers did not make sufficiently detailed proof that the anti-trust promises tainted the solicitation of members, the record is clear that no representations petitions were filed until *after* the price-fixing scheme had been exploited at a union organizing meeting. Employer efforts to show approximately how many salesmen attended that meeting (App. 54a), or approximately how many, or what proportion of, membership applica-

tions were obtained *after* the price-fixing scheme was announced (App. 55a), were thwarted by the Hearing Officer. Although a boast by the President of the organization that 500 people were at the meeting is in the record (App. 51a), the employers explained that they wished to show how seriously the price-fixing propaganda tainted the union's solicitation and contended that applications obtained by this bait should not be accepted as a proper "showing of interest" (App. 55a-57a). There is utterly no evidence that the organizers at any time abated or lessened their program.

The lead and concurring opinion treat this case as the usual one of an election campaign in which a union misrepresents economic benefits it has obtained elsewhere or an employer threatens dire things if a union wins; the opinions assert the cliche that the Board does not ordinarily censor election campaign material but leaves it to the parties to rebut each other's arguments. That line of reasoning wholly misses the point:

The employers' quarrel here was not so much with the union as with the federal agency in charge of labor matters which refused even to decide whether the union's campaign pledge was illegal. While the employers might reply to the *union* they had no means of reply to the *federal agency* which, faced with a blatantly illegal program refused to say so. Necessarily, many employees would tend to believe that no federal agency would fail to denounce a scheme that violated federal labor-management law if in fact it did so violate. Necessarily, the Board's silence was an implicit condonation of the scheme. Thus, the Board not merely lent its facilities, but tended to convey the impression that there was no merit to the employers' claim of illegality. Willy-nilly, the Board

placed its weight in favor of the union and in derogation of the employers' assertions that the promise was illegal. Rather than recognizing a blatant violation of federal law the Board threw its weight on the scales in favor of the union.

The Board's action here is the precise contrary to its approved action in *Truck Drivers and Helpers, Local Union 568* v. *N.L.R.B.*, 379 2d 137 (D.C. Cir. 1967), where different unions represented employees in two facilities being merged into one. In an election campaign as to which union would represent the combined employees in the surviving facility one of the unions threatened to discriminate against the members of the other in seniority matters, *i.e.*, threatened, if elected as bargaining agent, to violate its duty of fair representation. The Board set the election aside and prosecuted the union for an unfair labor practice. This was approved by the Court of Appeals for the District of Columbia which pointed out (379 F 2d at 145) that Section 7 of the Labor Act means "that employees shall not be subjected to improper pressures or influences in their selection of a union." The promise in *Truck Drivers* was no more illegal than the promise here. The present decision of the Seventh Circuit is therefore contrary to the decision of the District of Columbia Circuit in *Truck Drivers*.

3. *The Court of Appeals has promulgated a new doctrine that the secrecy of the ballot may be invaded because a party attacking a Labor Board certification must show as a fact that improper campaign conduct "won the election" on which the certification is based.* The lead and the concurring opinions are premised on the proposition that one attacking a Labor Board certification must show not only that an improper element was injected into the

election process underlying the certification but that in fact the improper element *"won the election."* The lead opinion is bedded on the proposition that,

> "There is no proof that the scheme won the election for the Union."

This is a new and pernicious doctrine that, if permitted to stand, will unsettle salutary Labor Board representation procedures:

If a contestant must factually prove that an admittedly serious misrepresentation actually *"won the election"* it necessarily follows that the secrecy of the industrial ballot is to be broken and employees must be subpoenaed (because it is unlikely that many would appear voluntarily), to tell *how* they voted and *why*. Any notion that such may be done has been rejected by this Court because such inquiries would destroy the "privacy of the voting process, which is of great importance in the industrial world * * *." *N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324, 332) and, we believe, by all circuits, including the 7th (*Celanese Corporation of America* v. *N.L.R.B.*, 291 F. 2d 224, 226, 7 Cir., 1961.[2]) The Board's *Twenty-third Annual Report* states at page 48:

> "In determining whether specific conduct has prevented a free election, the Board does not attempt to assess its actual effect on the employees but concerns

[2] "It is conceded by the Board that it would have been as improper for the employer to have canvassed the employees to ascertain why or how they voted as it would be to similarly question voters after casting their secret ballots in other elections."

itself with whether the conduct 'reasonably *tends* to interfere with a free choice of representation.'" (Emphasis in original.)

A typical Board case is *L. C. Fergus, etc. and International Brotherhood*, 118 NLRB 315, 316, holding:

"The employer excepts on the ground that (1) before the election can be set aside, there must be direct and positive proof that the conduct complained of did influence and prevent a fair election; and * * *. We find no merit in these exceptions.

"It is well established that the Board will not attempt to examine the subjective reaction of employees to alleged interference, but will concern itself with whatever the specific act reasonably *tends* to interfere with a free choice of representatives." (Emphasis in original.)

Either the "reasonably be expected" or the "reasonably tend" tests have been expressly approved by a majority of the circuits,[3] but they were not followed here.

In light of the findings of the Regional Director that the union distributed literature touting its price fixing

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[3] Third Circuit. *Carlisle Paper Box Co.* v. *NLRB*, 398 F.2d 1, 6 (1968).

Fourth Circuit. *Graphic Arts Finishing Co., Inc.* v. *NLRB*, 380 F.2d 893, 896 (1967).

Fifth Circuit. *NLRB* v. *Dallas City Packing Co.*, 251 F.2d 663, 666 (1958); see also *NLRB* v. *Bill's Institutional Commissary Corp.*, 418 F.2d 405 (1969).

Eighth Circuit. *NLRB* v. *Blade's Manufacturing Corp.*, 344 F.2d 998, 1003 (1965).

Ninth Circuit. *Gallenkamp Stores Co.* v. *NLRB*, 402 F.2d 525, 534 (1968).

Other circuits have approved the same test in substance:

scheme to employers and employees, "that there were discussions of the Petitioner's program at union meetings, including a possible pricing formula," and that "it was the intention of the Petitioner to raise the matter in collective bargaining, if it was chosen as collective bargaining representative of the employees," (App. 5a) the Seventh Circuit could not rationally have found that the conduct did not "reasonably tend to interfere with a free choice of representation." The record compelled it to create a new standard, *i.e.*, that the improper propaganda was in fact the *decisive factor*, in fact *"won the election."*

If this new standard be permitted to exist, it will have two results:

First, it will be seized on by every employer and union that utilizes improper election methods as an excuse for retaining ill-gotten victories.

Secondly, necessarily the standard can be met, or applied, only by a subjective interrogation of employees as to how and why they voted as they did. Thus the decision will destroy the secrecy of the industrial ballot. This matter, without more (and there is more) merits review.

The lead and concurring opinions both base their holdings in heavy part on the asserted failure of the Em-

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[3] (Continued)

First Circuit. *NLRB* v. *Trancoa Chemical Corp.*, 303 F.2d 456, 461 (1962).

Sixth Circuit. *NLRB* v. *Louisville Chair Co.*, 385 F.2d 922 (1967).

Tenth Circuit. *Excelsior Laundry* v. *NLRB*, 409 F.2d 70 (1969).

District of Columbia Circuit. *Truck Drivers and Helpers, Local Union 568* v. *NLRB*, 379 F.2d 137, 145 (1967).

ployers to introduce "subjective evidence" that the Employers in fact had been prevented by the Board's hearing officer from presenting. For example, the employers sought to prove the number of employees present at the mass meeting of January 28, 1968 at which the price fixing scheme was explained,[4] and the number or the proportion of membership applications that were signed at the January 28 meeting or thereafter (App. 54a-55a). Thus, one of the vices of the method of review adopted by the lead and the concurring opinions is that, by attempting to weigh subjectively evidence the Board refused to pass upon, the Court places itself in the strange position of complaining that Petitioners did not prove facts which the Hearing Officer (affirmed by the Board), would not let Petitioners prove.

Of a piece with the lead opinion's doctrine that it was incumbent upon Petitioners to prove that the price fixing scheme "won the election" is its contention that Petitioners "failed to satisfy their burden of proof in this Court that the representation election was unfair and the Board's certification of the Union arbitrary". Whether in Board or Court, such burden heretofore has existed only where the complaint is of "trivial irregularities of administrative procedure." Only in such cases has the objector to an election been placed under the burden of proving actual prejudice. *NLRB* v. *Mattison Machine Works*, 365 U.S. 123; *Celanese Corporation of America* v. *NLRB*, 291 F. 2d 224, 226, 7 Cir. 1961. In all other cases, where improper conduct or the insertion of false propaganda is shown, the issue always is determined by a consideration of whether the false propaganda (or conduct) "reasonably *tends* to interfere with a free choice."

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[4] There is some proof that 500 salesman were present (App. 51a). The employers sought to make this more specific.

A student of the Court of Appeals opinions, endeavoring to extract a rule from them, will conclude that patently illegal bait may be dangled before the electorate; that the Board will not act before the election to exclude illegal bait from a campaign; that, although the Board is under a duty to recognize the illegal nature of the bait (Fairchild and Hastings), nevertheless, the election cannot be set aside unless the contestant carries the burden of showing by subjective evidence that the illegal bait or scheme "won the election". This should not be the law.

4. *The majority of the Court of Appeals has followed an impermissible mode of review by attempting to make fact findings on a subject the Board made no findings on whatsoever.* The Court of Appeals, in a serious departure from its appellate function, has arrogated to itself the role of initial fact finder. The Board in no way passed upon the impact the illegal promise had upon the electorate. The Hearing Officer had found that the price-fixing scheme was widely publicized both to employers and employees and that the union planned to press the matter in collective bargaining; but he and the Board refused to pass upon the legality of the scheme or what effect it had upon the electorate. Obviously a plan which brought success to a failing organizing drive, "reasonably tended" to have some influence upon the electorate, but the majority of the Court of Appeals, overlooking the fact that the Board had made no findings on the subject and misapprehending the facts, went on to weigh the facts and to decide that they did not show that the promise of the scheme "won the election." The majority of the Court therefore, in creating an erroneous new standard and acting as an initial finder of fact under it assumed a function not permitted courts of review.

5. *The concurring opinion by its statement "the fraud, if any, was on the employees not the employers," implicitly holds employers cannot raise such questions and is in conflict with the law of virtually every Circuit.* In virtually every, if not all cases in which only one union was involved, where elections have been set aside because of union misconduct or false propaganda, the complaint or objection has been lodged by the employer. (See collection of cases in *Home Town Foods, Inc.* v. *N.L.R.B.*, 416 F 2d 392 (5 Cir., 1969)). This follows from the fact that the employees are unorganized and have no one to speak for them; they are not parties to the record.

But in this case the concurring opinion shrugs off the fraud on the theory it was on the employees while the employers are complaining about it. We do not accept the concurring opinions' assertion that the fraud was only on the employees—it was on the employers also. But in any event the denial of an employer's right to raise matters of fraud on his employees in connection with their relationship with him is a matter worthy of certiorari. The cynical and callous pronouncement of the concurring opinion that employer complaints of fraud on employees may be disregarded is, we believe, wholly without precedent. In the interest of fair treatment of employees and employers alike and of non-fraudulent elections it should be stamped out before it has opportunity to spread. As the dissenting opinion shows "the net result" of the majority's action is that the union gets "its foot in the door" by a fraudulent campaign; it cannot deliver on its promise to make life easier and rosier for employer and employee through price fixing, but yet the employees are locked in and cannot select another bargaining agent or unhorse

this fraudulent one for at least a year after bargaining commences. It is little wonder that the dissenting judge said he was unwilling to subscribe to "such an anomalous result"—and certainly this Court should not.

Respectfully submitted,

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APPENDIX

JUDGMENT OF COURT OF APPEALS

(Caption Omitted)

Before: Hastings, Senior Circuit Judge, Fairchild and Cummings, Circuit Judges.

This Cause came on to be heard upon a petition to review, and a cross-application to enforce an order, as corrected, of the National Labor Relations Board, issued on April 24, 1969, against petitioners, their officers, agents, successors, and assigns. The Court heard argument of respective counsel on January 13, 1970, and has considered the briefs and transcript filed in this cause. On April 8, 1970, the Court being fully advised in the premises, handed down its decision denying the petition for review and granting enforcement of the order of the Board. In conformity therewith, it is hereby

Ordered And Adjudged by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Petitioners, their officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

/s/ Thomas E. Fairchild
Judge, United States Court of
Appeals for the Seventh Circuit

/s/ Walter J. Cummings
Judge, United States Court of
Appeals for the Seventh Circuit

UNITED STATES OF AMERICA.
BEFORE THE NATIONAL RELATIONS BOARD,
Thirteenth Region.

Fencle-Tufo Chevrolet Inc., and consolidated cases, *Employers*, and American Federation of Professional Salesmen, *Petitioner*.	Case Nos. 13-RC-11391, et al.

DECISION, ORDER AND DIRECTION OF ELECTIONS.

(Immaterial portions omitted)

Upon separate petitions duly filed, hearings were held before William D. Boettcher, a hearing officer of the National Labor Relations Board.[2] The hearing officer's rul-

[2] The above-captioned cases were heard as follows: *Fencl-Tufo Chevrolet Inc.*, 13-RC-11391, was consolidated and heard with 25 cases involving other Employers in a single hearing. Thereafter, *Charles R. Hearn Inc.*, 13-RC-11422, was consolidated with cases involving 10 other Employers and heard in a separate hearing. *Mackaye Motors, Incorporated*, 13-RC-11418, was originally consolidated with the *Hearn* case; however, it was severed by the hearing officer and heard separately. *Peoples Pontiac Inc.*, 13-RC-11401, was heard separately.

In all of the above cases, the Employers are represented by the same counsel, who have filed a brief encompassing all of these cases. While there are minor unit questions not common to all, all cases involve the same central issue, and motions to incorporate the record of the *Fencl-Tufo* case have been granted in each. In the interest of avoiding cost and delay, I have consolidated all of these cases for the purpose of decision and possible review. However, as hereinafter indicated, for the purposes of election and post-election processing, the cases are hereinafter severed.

ings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to Section 3(b) of the National Labor Relations Act, the Board has delegated its powers herein to the undersigned Regional Director.

Upon the entire record, the Regional Director finds:

1. The Employers and each of them are engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent employees of the various Employers involved. The Employers contend that the Petitioner is not a "bona fide organization." In the brief submitted, under the heading "Issues", the Employers state, *inter alia:*

> The program touted by the so-called union is nothing more than a bold conspiracy to foist an unlawful price-fixing program on the automobile dealers in the six county Chicago area. Promotion of such a program under the guise of a labor organizational campaign raises issues which place the policies of the anti-trust laws and the labor laws at stake.

The petitioner has an office in Chicago, Illinois. For some months prior to the hearing, it carried on an organizing effort among motor vehicle salesmen in the Chicago metropolitan area—Cook, Lake, Will, Kane and DuPage Counties, Illinois, and Lake County, Indiana. It has issued circulars and bulletins and held meetings of and with salesmen. Petitioner has several paid officers and an executive board of over 30 persons, all of whom are, or have been, motor vehicle salesmen. It has a constitution and by-laws which were voted upon by Petitioner's membership. A witness for Petitioner testified that its purpose in organizing automobile salesmen was to ". . . implement the declared policy of the United States in encouraging the organization of workers into labor organizations to better the terms and conditions of

their employment, spells these terms and conditions out in a collective bargaining agreement." Petitioner's Constitution and By-laws provide that the purposes of the organization are: "A. to unite the workers within its jurisdiction into a single, cohesive force for the purpose of bargaining collectively to [im]prove the terms and conditions of employment. B. to do all things necessary and proper to insure and secure for its members the enjoyment of their God-given rights." The Petitioner has neither negotiated nor executed collective bargaining contracts with any employer.

The Petitioner adopted its name prior to November 1, 1967, when the Communication Workers of America, AFL-CIO, issued an organizing charter to it. On January 28, 1968, the Petitioner's membership voted to disaffiliate from the Communication Workers and, on January 31, 1968, the Communication Workers revoked the charter it had issued to the Petitioner.

From careful consideration of the entire record in these cases, it appears, and I so find, that the Petitioner is an organization in which employees participate and that it exists for the purpose in whole or in part of dealing with employers concerning wages, hours, and other terms or conditions of employment and is, therefore, a labor organization within the meaning of Section 2(5) of the Act. *Alto Plastics Manufacturing Corporation*, 136 NLRB 850. Neither the Petitioner's January 1968 disaffiliation from the Communication Workers (*Dryden Rubber Division of Sheller Manufacturing Company*, 118 NLRB 369), the fact that the Petitioner's constitution and bylaws may not have been, prior to the dates of the hearings, adopted in final form (*Burroughs Corporation*, 116 NLRB 1118), nor the fact that, as of the date of the hearings, the Petitioner had not negotiated any collective bargaining agreements (*Plains Cooperative Oil Mill*, 123 NLRB 1709), warrants a contrary conclusion.

In regard to the Employer's allegation that the "program touted" by the Petitioner is a "conspiracy to foist

an unlawful price-fixing program" on Chicagoland automobile dealers, including the Employers, it appears that the Petitioner sent letters to some but not all of the Employers which, in addition to claiming majority status and requesting bargaining meetings with the Employers, also contained the following language, *inter alia:*

> Further it would be in your interest to carefully investigate the Union's program and find out how the collective bargaining agreement we propose could guarantee you, and all the dealers in the area, a *minimum* net profit (I repeat NET) equal to three per cent of the list price of the unit.

The Petitioner apparently also sent the same letter, without the language noted, to some, if not all, of the Employers who had been sent the earlier letter. In at least one case, it appears that no letter was sent at all.

It also appears that, in literature distributed to various automobile salesmen, the Petitioner stated, *inter alia,* as an answer to "why" salesmen should join the Petitioner:

> 5. To put your employer back into the retail business by guaranteeing him a net profit, after all expenses are paid, equal to three percent of the list price.

It further appears, from the record, that there were discussions of the Petitioner's program at union meetings, including a possible pricing formula. The record establishes that it was the intention of the Petitioner to raise the matter in collective bargaining, if it was chosen as collective bargaining representative of the employees.

The Employers' motion to dismiss the petitions on the basis of possible violations of "anti-trust laws" are hereby denied. In reaching this decision, I have given consideration to all relevant factors indicated by the record, including, but not limited to, the policy of the Act, the rights of employees under the Act, and the public interests which allegedly would be in conflict if the petitions were not dismissed. The immediate question to be an-

swered is whether collective bargaining may be appropriate in the circumstances here. To grant the Employers' motion would be to deny to the employees their statutory right to vote as to whether or not they wish to be represented by the Petitioner for purposes of collective bargaining. Further, it is obvious that, at present, it only is possible to speculate as to whether the Petitioner will be chosen as the bargaining representative of any of the individual Employers' employees and/or whether, if selected as bargaining representative, the Petitioner would seek to incorporate the allegedly unlawful plan into a collective bargaining agreement. It must also be noted that, if chosen by the employees, the Petitioner's certification will be for each appropriate unit of the separate Employers whose employees so vote. It must be remembered that where, as here, a petitioner qualifies as a labor organization, the Board may not refuse to process petitions filed pursuant to Section 9(c)(1)(A) of the Act. "For, it must be remembered that, initially, the Board merely provides the machinery whereby the desires of the employees may be ascertained, and the employees may select a 'good' labor organization, a 'bad' labor organization, or no labor organization, it being presupposed that employees will intelligently exercise their right to select their bargaining representative." *Alto Plastics, supra.* Most importantly, the Board administers the Act and is duty bound to concern itself solely with those matters which are within the scope of the statute, and to exercise only those powers which Congress invested in it. Nothing in the Act empowers the Board to pass judgment on whether the alleged anti-trust ramifications of a plan such as the one in question violate "anti-trust" laws. Under all of the circumstances, and contrary to the Employers' position and despite the authorities it cites, it is the opinion of the undersigned, and I find, that to withhold processing of Petitioner's petitions would neither effectuate the purposes of the Act nor be consistent with the powers that Congress invested in the Board.

DIRECTION OF ELECTIONS.

Elections by secret ballot will be conducted by the undersigned Regional Director among the employees in the separate units found appropriate in the paragraphs above at the time and place set forth in the notices of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the units described above who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by American Federation of Professional Salesmen.

ORDER.

These cases having been consolidated for purposes of hearing and decision, and separate units having been found herein, and elections having been directed therein, upon consideration, I am of the opinion, and find, that it will effectuate the purposes of the Act to sever these cases. Accordingly,

It Is Hereby Ordered that the cases herein consolidated shall be severed for purposes of election and post-election processing at such time as: (1) the time for filing of a

request for review with the Board in Washington, pursuant to the Board's Rules and Regulations, has expired without such request having been filed; or (2) the Board has refused to grant any request for review filed; or (3) the Board has granted request for review and has considered and ruled upon the grounds relied upon; or (4) upon receipt from the parties of a waiver of their right to request review, whichever date is the earliest.

Dated at Chicago, Illinois, this 30th day of April 1968.

/s/ Ross M. Madden
Regional Director
National Labor Relations Board
Thirteenth Region
219 South Dearborn Street, Room 881
Chicago, Illinois 60604

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

* * (Caption—13-RC-11391, et al.) * *

PETITION FOR REVIEW OF DECISION AND ORDER FOR ELECTION OF REGIONAL DIRECTOR, 13TH REGION AND MOTION TO STAY DIRECTION OF ELECTION UNTIL THE PETITION BE FINALLY ACTED ON.

The Regional Director's Decision and Direction of Election should be reviewed because it raises a substantial question of law and public policy as to whether the Board will permit its representation facilities to be used by an asserted labor organization which has solicited memberships and requested so-called bargaining for the dominant purpose of carrying to fruition a criminal conspiracy under the Sherman Act.

This question has never been passed upon by the Board.

The Regional Director's excuse that "* the Board * * is duty bound to concern itself solely with those matters which are within the scope of the [National Labor Relations Act] * *. * * nothing in the Act empowers the Board to pass judgment on whether the alleged anti-trust ramification of a plan such as the one in question violates the 'antitrust' laws", is ridiculous—the Board constantly considers the interaction of various laws, state and federal, with the Labor Act; it is under mandate from the Supreme Court so to do (*Southern Steamship Company* v. *N. L. R. B.*, 316 U.S. 31).

The Regional Director has confused the Board's lack of jurisdiction to impose penalties, or directly enforce other laws, with its duty to consider "labor" conduct in the light of other laws and public policy, for example, those with respect to racial discrimination.

The Regional Director's assertion that there is merely an "alleged" question of an anti-trust conspiracy is patently contrary to undisputed fact and to undeniable

law. There is no question under this record but that a conspiracy has been formed between the alleged organization, its officers and members to cooperate with management to fix prices for the retail sale of automobiles in the Chicago metropolitan area. Although the illegal program has been assailed for several months by representatives of automobile dealers in the various cases referred to, or embodied in the instant record, the petitioning, so-called union has never disavowed it. It cannot do so because it has represented to thousands of automobile salesmen that it has found a new way to ease the difficulties of the retail automobile business through a system by which neither the employer-dealer nor the employee-salesman will suffer but both will profit, i.e., a system to control prices to prevent the sale of automobiles at any price that will not provide an increased commission, pension and benefit plan for the salesmen and a "guaranteed net profit" of 3% to the dealer.

The Board's records are clear that the moving spirits in the presence of the union organization have been endeavoring for a good many years to organize automobile salesmen in the Chicago metropolitan area and have met with little success. (Cf. *Gateway Chevrolet Sales, Inc.*, 13 C. A. 6644; *Nelson Chevrolet Company*, 13 C. A. 6643; *Walton Motors, Inc.*, 13 C. A. 6719, to name a few cases.) However, the number of petitions in the present consolidated case and the other records embodied in this case show that the organizers recently have had a degree of success, not consistent with their past records, in obtaining application cards. Yet the only new ingredient has been the new theory which may be summed up as,

> "Join the union because we aren't going to hurt the boss we are going to do him a favor and you by raising the prices of automobiles in Chicago so that everybody, employer and employee, makes more money."

The illegality of such a program is manifest. This is not a program under which it may be anticipated the

price of a product or a service sooner or later may rise as a result of increased benefits which the union may get from an employer. This is a program to increase prices by a formula so that employers are guaranteed a fixed and determined profit and benefits are guaranteed to employees as a result of a pricing formula. Price fixing is its pith and core.

In addition to the illegality of the plan, the Board should consider the cruel deception that it will work upon employees if it permits the order for an election to stand. It should consider also the violation of "laboratory" standards in the representation process that would be involved if it permits the union to go into an election with the fraudulent promise that it can get and enforce contracts that violate the criminal laws of the land.

Employees doubtlessly assume that in an ordinary case, the Board, by simply conducting an election, is expressing no opinion and giving no indication whether the union is "good" or "bad". But an employee is entitled to assume that the Board would not permit an election to be held, much less to certify a union if it won a majority vote, if the union's program was to engage in a criminal conspiracy. Here the issue has been raised. It is a certainty that if the employee eligible to vote does not yet know, they will by the time the campaign is over know from perfectly permissible employer publicity, that the union's program is illegal. Yet some will wonder and inevitably think no responsible government agency would lend its office and permit an election to be held on behalf of a group of organizers who were in a criminal conspiracy.

The Regional Director's decision avoids the hard facts we have just mentioned. It would place the Board in the position of willy-nilly, and by silence, furnishing the means by which an integral step of illegal conspiracy may be carried into effect.

The Regional Director's blindness to basic antitrust principles is particularly obnoxious because Congress long

ago recognized that the Sherman Act is difficult to enforce. Congress, therefore, provided for ancillary enforcement of the Act by private treble damage action. Congress recognized that because of limitations of manpower and complexities of modern business that the Justice Department alone probably could not do the job. In the face of the foregoing well known political and legal facts the Regional Director had no right to close his eyes to the obvious.

Facts

Earlier we have alluded to some of the cases tracing the history of one Merlin Griffith who has been occupied for some time in trying to organize automobile salesmen of the Greater Chicago metropolitan area. Examination of his background discloses that Griffith sometimes has operated as a one-man band with a so-called independent labor organization; for a brief time he secured a Charter from the Distillery and Wine Workers which was revoked because his misuse of and failure to account for funds. In the fall of 1967 Griffith with one Cameron and one Golden, and having no members whatever, induced the Communications Workers of America AFL-CIO to issue an organizing charter for a new Local No. 5056, which supposedly was to organize automobile salesmen. Within a short time the Communications Workers withdrew that charter.

On January 28, 1968 Griffith held a meeting for those who signed application cards running to Local No. 5056, at which a vote was taken that whatever then existed by way of a labor organization would continue as an independent. No notice was ever given the members, if such they were, that a change of affiliation or disaffiliation was to be considered at this meeting. But at this meeting according to stenographic transcripts of the proceedings admitted in evidence in the instant case, the price fixing conspiracy was explained in great detail, as we set forth under our next heading.

The Price Fixing Conspiracy.

The principal piece of literature circulated by the organizers throughout the fall of 1967 and early winter months of 1968, both while the organizers were operating under the short lived charter from the Communications Workers and as independents stated as a principal reason "why" salesmen should sign authorization cards:

> "5. To put your employer back into the retail business by guaranteeing him a net profit, after all expenses are paid, equal to 3% of the list price." (See Decision Page 4.)

Plainly, although this does not describe the price-fixing system, it states a non-labor objective.

Next came letters of demand for recognition sent to various employers during January and February of 1968, in which the so-called petitioning union said that it proposes to:

> ". . . guarantee you, and all dealers in the area, a minimum net profit (I repeat NET) equal to 3% of the list price of the unit." (See Decision Page 4.)

(After the present issues were raised subsequent demand letters eliminated the foregoing language, but the union has never disavowed the scheme.)

The matter was fully explained to the salesmen at the meeting of January 28, 1968 by Robert Cameron, who says he is President of the so-called organization. After telling of the things he expected to accomplish and outlining in general terms how everyone would be guaranteed a raise and a profit, Mr. Cameron went on to show precisely how the system would work by citing an example of a car which was invoiced by the factory to the dealer at $3,120.00. He said:

> "To this invoice of $3120 we would add one quarter of one per cent for our health and welfare program, which is $10. We would add another one quarter of

one per cent for our retirement program, which is another $10. We would add 4½ per cent as the sales commission, which is $180. We would add 2 per cent for the service, get-ready, advertising, and office expense of the dealer, which is $80. We could then guarantee the dealer a minimum profit equal to 3 per cent of the list price of the car, which is $120."

"We could guarantee this and we would guarantee it by Article 8, which is the one I didn't read before.

"Article 8 of our agreement would read as follows:

'Salesmen will not be required to sell a new motor vehicle at a price less than 12 per cent off the list price less transportation and delivery of the motor vehicle. We take the 12 per cent off and we are right down to this figure of $3520'."

There could not be a clearer, more flagrant price-fixing conspiracy in clear violation of the antitrust laws than the foregoing. If carried into effect those participating in it—union members or dealers—would be subject to steep fines and imprisonment.

Legal Authorities Show That the Board Must Consider the Anti-Trust Question.

This price-fixing program unquestionably is a flagrant violation of the Sherman Act. Even the dissenting opinion of Justice Goldberg in *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1964) at p. 710 concedes that unions may not make or connive in product price-fixing agreements—and the proposal here is for unadorned product price-fixing.

The Board is required by law to take into account the policies of Federal statutes other than the labor laws. *Southern Steamship Co.* v. *Labor Board*, 316 U. S. 31, 46-47 (1942).

In *Southern Steamship*, seamen were discharged for mutiny in violation of the Criminal Code, by striking

while a vessel was on a voyage but was in a harbor. The Board disregarded the violations of the Criminal Code and ordered reinstatement of the employees, on the theory they were merely striking in response to an unfair labor practice. The Supreme Court reversed the Board and strongly criticized it for failing to take account of laws other than labor laws.

> ". . . The Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

In the face of this Supreme Court opinion, the Regional Director has done the very thing which has been prohibited by the Supreme Court. The Regional Director's decision states, at page 5:

> "Most importantly, the Board administers the Act and *is duty bound to concern itself solely with those matters which are within the scope of the statute,* and to exercise only those powers which Congress invested in it. Nothing in the Act empowers the Board to pass judgment on whether the alleged antitrust ramifications of a plan such as the one in question violate 'anti-trust' laws." (Emphasis supplied.)

The Supreme Court says this agency may not be so "single-minded" that it can wholly ignore other and equally important Congressional objectives, but the Regional Director has ignored this binding law and says he is concerned "solely" with the Labor Act. Paraphrasing from *Southern Steamship,* it is not too much to demand of the Board that it undertake and discharge the duty the Regional Director violated.

That the "other laws" which the Supreme Court ordered the Board to take account of include the antitrust laws and that labor organizations acting in concert with employer groups are subject to them is clearly established. *Mine Workers (UMW)* v. *Pennington*, 381 U. S. 657 (1965); *Meat Drivers* v. *United States*, 371 U. S. 94 (1962); *Allen Bradley Co.* v. *Local 3, Electrical Workers*, 325 U. S. 797 (1945).

Precedent for finding a program very similar to the price-rigging program here in question may be found in *Associated Orchestra Leaders* v. *Philadelphia Musical Society*, 203 F. Supp. 775 (E. D. Pa. 1962). In that case the antitrust laws were held applicable to a union where the union and employers had conspired to restrain competition by setting minimum prices for engagements and where the union prohibited musicians from playing with orchestra leaders not complying with minimums, just as the Petitioner here would prohibit salesmen from selling automobiles below a minimum fixed price.

Proper Disposition of the Case.

The case should be reviewed and disposed of without looking "solely" to the Labor Act.

Such review will, we suggest, persuade the Board that it cannot lend the prestige of the United States Government to a scheme to violate an act as important as the Labor Act—the Sherman Act.

Two possible courses of action are open:

1. Dismissal of the petitions. This we believe is the proper course for there is sound reason to believe that many of the authorization cards were obtained fraudulently, i.e., upon the assumption that the so-called union would proceed lawfully.

2. Withholding of Direction of Election until a suitable time after Petitioner has submitted proof that it has abandoned its illegal program and has so notified every person from whom it has obtained an authorization card.

This alternative disposition would not be wholly satisfactory but it would at least go part way in protecting employees from the deception that has been practiced on them and would get the Board out of the ambivalent position the Regional Director would leave it in of sponsoring an election through which an organization might receive Government sponsorship even though its central purpose was to violate a basic federal statute.

Employers pray that the Direction of Election be stayed pending decision of this Request for Review.

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C. David Burns
Richard F. Vitkus,
Attorneys for Employers.

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Chicago, Illinois 60603,
Of Counsel.

ORDER OF BOARD DENYING REVIEW

RAAUIJHZ RUEVDEL0012 1381715-UUUU—RUCHLAC.

FM JOHN C. TRUESDALE ASSO EXEC SECY WASH DC NLRB

TO RUCHLAC/4/NLRB 13 TH ~~REG.~~ ATT: ROSS MADDEN CHICAGO, ILL.

RE: FENCL-TUFO CHEVROLET INC., ET AL. 13-RC-1191-4-5-6-8-400-1-3-4-5-6-10-18-19-22 — 23-27-29-30-32-34-35 — 36-38-39 — 43 — 46-55-56-71-72-76-77-84-85-86-94-99. IT IS HEREBY ORDERED THAT THE EMPLOYERS' REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION, ORDER AND DIRECTION OF ELECTIONS BE, AND IT HEREBY IS, DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW. BY DIRECTION OF THE BOARD:

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD.

* * (Caption—13-CA-8598, et al.) * *

TRIAL EXAMINER'S DECISION.

(Immaterial portions omitted)

Statement of the Case.

A. Norman Somers, Trial Examiner: On an order issued November 15, 1968, consolidating 24 complaint cases for hearing and decision, I held a hearing on November 18, 1968, in Chicago, Illinois, in which all parties, the General Counsel, the Respondents, and the Charging Union, were represented. The complaints against each of the 24 Respondents had been issued on separate charges against each, filed by American Federation of Professional Salesmen (hereafter AFPS or the Union).[1] The complaint in

[1] The respective charges were filed, all in 1968, during the period from August 20 to and including October 14,

each instance alleges that Respondent there named refused, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, to bargain collectively with AFPS as the representative of the employees of said Respondent pursuant to a certification issued by the Board following a Section 9 election held in respect to the employees of each Respondent. In this, the unfair labor practice proceeding now before us, each Respondent denies it violated Section 8(a)(5) and (1) on the same grounds on which, in the representation proceeding, it resisted certification of the AFPS. The answer, in each instance, further disputes that the AFPS sent a legitimate request for bargaining within the confines of the applicable certification as issued.

I. The Representation Proceedings Culminating in the 24 Certifications.

Respondents are retail automobile dealers whose respective premises or establishments are separately located within six counties in the Metropolitan Chicago area. The AFPS conducted organizing activities among the salesmen respectively employed in these establishments, and filed with Region 13 of the Board separate petitions for representation in respect to a number (some 70-odd) automobile dealers in the area. All of them (termed the "Employer" in each such Section 9 proceeding) had the same legal representation. These were Mr. C. David Burns, executive vice president of the Employers' Association of Greater Chicago (hereafter Burns or the Employers' Association) and Attorneys George B. Christensen and

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[1] (Continued)
and the corresponding complaints were issued from September 27 to and including October 18. The specific dates are listed in the Index of G. C. Exh. 1, which is the formal exhibit containing copies of the charge, complaint, and answer in each instance. These, along with the respective proofs of service, are G. C. Exh. 1(a) through 1(qqqqq). The order of consolidation issued November 15 is G. C. Exh. 1 (sssss), and the Index is G. C. Exh. 1 (ttttt).

Richard F. Vitkus, of the firm of Winston, Strawn, Smith & Patterson, the latter being the attorneys for the Respondents in this consolidated complaint proceeding. These RC petitions were consolidated for purposes of hearing and preelection decision among three groups of employers, and the group within which a case was consolidated had no significance other than the sequence in which the respective RC petitions were filed or the preelection hearings in respect to them held. Each of the 24 Respondents before us was in one of these three groupings, and each group, or consolidated RC case, was identified by the name of the Employer whose RC number happened to have been the earliest in the group (in the same way, for example, as in the consolidated CA cases before us, the Respondent with the pilot name, Schmerler Ford, Inc., happens to have the earliest CA number). The three consolidated preelection hearings were held before the same hearing officer, and in each of the three consolidated RC proceedings, the Regional Director issued a separate Decision, Order, and Direction of Election. The Decision, Order, and Direction of Election in each instance shows the group in which a given Respondent before us was involved. Thus, the so-called *Fencl-Tufo Chevrolet, Inc.*, group involved RC petitions separately filed in respect to 39 Employers, and of them 14 are Respondents in our consolidated complaint case; the *Borg Pontiac* case involved 11 Employers, and of them 3 are Respondents before us; and finally, the *George C. Poole* group involved 23 Employers, and of them 7 are Respondents before us. This completes the roster of 24 Employers (the Respondents in the unfair labor practice case before us), in which the AFPS was successful in the respective elections held among the employees (the salesmen) of the various Employers that had been involved in the RC proceedings.[2]

[2] As the Decision, Order, and Direction of Election in each grouping stated, the consolidations were limited to the steps preceding the election, and in every instance, the

As the Directions of Election and Petitions for Review indicate, there is a common basis on which all the Employers resisted the respective petitions for representation as filed by AFPS. Preliminarily, however, we state the matters which were not in dispute in the representation proceeding, nor are they in dispute here. The parties agreed that the Employer in each instance is engaged in the retail sale and distribution of automobiles, trucks, and related products and has an annual revenue, and sells and ships products in an annual amount outside of Illinois to an extent meeting the jurisdictional requirements of Section 2(6) and (7) of the Act, and the salesmen in each separate instance constitute an appropriate bargaining unit within the meaning of Section 9(b) of the Act. It is also not disputed that in the election held separately among the employees of each such 24 Employers, the AFPS polled a majority of the votes among such employees

The dispute which was raised in common by these Employers in the representation cases was over whether AFPS is a "bona fide" labor organization within the meaning of the Act, or even if it is such, whether it would effectuate the policies of the Act to entertain the representation of the AFPS in the light of its purpose as asserted by Respondents.[4] The Employers' contention

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[2] (Continued)
cases were severed for purposes of election and postelection processing. Under the designation, "The Units for Collective Bargaining," a separate election was directed for each separate unit of employees of the respective Employers.

[4] Three other such Respondents (those who were in the *Borg Pontiac* group, G. C. Exhs. 6, 7, and 8, and who are the respective Employers in the Certifications of Representative whose copies are included in our record as G. C. Exhs. 9(a), (b), (c) (see Appendix A attached), raised an additional objection based on the claimed inadequacy of the authorization cards in connection with the

that the AFPS is not a "bona fide" labor organization was premised on the following: that though the AFPS is an organization in which employees participate and which purports to exist for the purpose of dealing with Employers in respect to terms and conditions of employment, this is superseded by evidence demonstrating that it is "a bold conspiracy to foist an employer price-fixing program on the automobile dealers in the six-county Chicago area." The evidence in support of that contention included (a) letters by the AFPS to Employers, in which, while claiming majority designation and requesting recognition for the purpose of collective bargaining in respect to wages, hours, etc., it also stated that under its contemplated bargaining proposals it "could guaranty you [the Employer] and all the dealers in the area, a minimum net profit (I repeat NET) equal to three percent of the list price of the unit," (b) literature distributed by AFPS to various automobile salesmen, in which, in answer to "why" salesmen should join AFPS, stated, among other reasons, that it would "put your employer back into retail business by guaranteeing him a net profit, after all expenses are paid, equal to three percent of the list price," and (c) discussions in union meetings of a possible pricing formula to be proposed to Employers in contract negotiations. The claim of the Employers was that such an agreement violated the antitrust law within the doctrine of *Allen Bradley Company* v. *Local 3, IBEW*, 325 U. S. 797; *Meat Drivers* v. *U. S.*, 371 U. S. 94; and *U. M. W.* v. *Pennington*, 381 U. S. 657, and that under the pronouncement in *Southern Steamship* v. *N. L. R. B.*, 316 U.S. 31, 46-47, that the Board must administer its law with due regard to the policies of other Federal laws, the Board should hold AFPS to be not a "bona fide" labor organization or in any event not fit to be certified as a bargaining representative.

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[4] (Continued)
"showing of interest" required as a predicate for holding an election. The Board, under its established doctrine that "showing of interest" cards are matters of inspection by the Board's agents and not litigable, rejected that ground of challenge, and it needs no further comment.

In substance, the Regional Director rejected the Employers' contention as a *non sequitur:* assuming that such an agreement if ever made would be offensive of antitrust principle (a matter which he did not deem called upon to determine), it did not follow that the organization was not a labor organization within the meaning of the Act or that it should be barred from acting as collective-bargaining representative even if chosen as such bargaining agent by the employees; on this type of thing, what the AFPS, if chosen as bargaining representative, might propose, the Employer could dispose by saying nay to price fixing and aye to working terms and conditions.

Whether my sketch of the Employers' contention and the rationale of the Regional Director's rejection of it embraces all the nuances is unimportant. What counts, at this adjudicative level at least, is that the contention was rejected, first by the Regional Director in his three separate Decisions and Directions of Election, and then by the Board in its denials of the respective Petitions for Review as raising no substantial issue. And so it was determined that in respect to all of the petitions, the AFPS *is* a labor organization within the meaning of the Act and that an election was appropriate in each separate instance. As stated, and as is not denied, these elections were held, the AFPS polled a majority among the employees of 24 of these Employers, and the Board issued separate Certifications of Representative in respect to each such Employer, covering the unit separately described in each Certification. And these are the 24 Respondents in the consolidated case before us.

II. The Complaint Proceedings.

A. The Pleadings.

After the respective Certifications issued, the Union (i.e. the AFPS) sent letters, and in one instance a wire, requesting bargaining. All of these were totally ignored by Respondents. As previously indicated, the Union filed charges and on them the General Counsel filed complaints.

separately against each Respondent, alleging refusal to bargain in violation of 8(a)(5) and (1). Respondents, by their counsel, correspondingly filed separate answers. The answers, in each separate instance, admitted the jurisdictional allegations, the appropriateness of the respective bargaining units, the majority polled by the Union in respect to each, and the issuance of the respective Certifications. As also stated, the answers denied nevertheless that the Union was the legal bargaining representative, because the respective Certifications were invalid "for each and all of the reasons asserted in the representation proceedings." There is no claim that there is newly discovered evidence on this issue, and all parties agree that the Trial Examiner is bound by the rulings and the Certifications in the representation proceedings. The denial by Respondent in each such instance is merely to preserve Respondent's position on ultimate review,— namely, that the Union's purpose was to effectuate a price-fixing agreement among the auto dealers in the area.

B. The Failure and Refusal to Bargain.

The above is essentially the basis also on which Respondents respectively deny the allegations made, in each separate complaint, that the Union requested bargaining and Respondents have failed and refused to bargain. The requests for bargaining were addressed to the aforementioned Burns, executive secretary of the Employers' Association of Greater Chicago, with copies, as stated on the face of each request, by the notation, "cc: All dealers listed above," to every dealer in respect to which a certification issued. The denial in each answer that the Union requested bargaining is accompanied, as earlier stated, with the assertion (par. VIII in each instance) "that no demand for bargaining within the confines of its certification, valid or invalid has been made by the Union." The explanation for this assertion, as given by Respondents at the hearing before me, was that by sending the succession of letters to Burns of Employers'

Association, the Union thereby confirmed the position Respondents had asserted in the representation proceedings,—that the Union had as its purpose a price-fixing arrangement among the dealers in the Chicago area. But that position is premised on the very position which was advanced to and rejected by the Board in the representation proceedings.[5]

* * *

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[5] The Board recently passed upon that same issue in a related situation in an unfair labor practice case. See *Borek Motor Sales, Inc.*, 173 NLRB No. 155. The complaint there alleged that the employer in that case (likewise a retail automobile dealer in the Chicago area) had discharged a salesman in violation of Section 8(a)(3) and (1) for joining and assisting the Charging Union (the AFPS, which then had been affiliated with another union, but with which it has since disaffiliated). The employer in that case (represented by the same counsel who appear for Respondents here) asserted, among other things, that "the Charging Party does not qualify as a labor organization under Section 2(5)" and, in any event, that "the Board has an obligation to deny the use of its processes to the Charging Party . . . because [it] allegedly intends to achieve its 'normal labor objectives' by conspiring with employers, in violation of the Sherman Act, to fix car prices." The Board stated:

> Assuming arguendo, as Respondent maintains, that the Charging Party's proposed bargaining platform is a blueprint for an unlawful price-fixing conspiracy, any employer confronted with such a bargaining proposal would be free to reject it and could not be compelled to do otherwise. Moreover, so far as the record shows, the Charging Party has not predicated its existence on its ability to obtain these allegedly unlawful price-fixing agreements from employers; it has merely indicated that it considers such agreements to be a means, albeit a preferred one, of securing employee benefits. In view of these circumstances, we can perceive no statutory justification for refusing to accord the Charging Party recognition as a labor organization under Section 2(5), and we therefore affirm the Trial Examiner's finding in this respect.

On August 16, the Union wrote Burns again with "copies to all Dealers concerned." It covered two subjects. As to the first subject, the Union stated:

> The Union would like to offer a suggestion as to how the negotiations could be handled, in order to shorten the number of meetings that will be needed before an agreement is reached. We think that if you were to hold the first bargaining session on a group bases [sic] and let the Union give you a proposal to cover all the Automobile Dealers where we have been certified, then this might shorten the negotiations considerable [sic] if after the first meeting on the group basis, you decide that you do not want to continue bargaining as a group, and the Dealers you represent would rather continue on a individual negotiating course, it would be theirs and your privilage [sic] to discontinue the group negotiations and continue on a individual basis as you and I both know is their right under the law. We believe [sic] that we could work out a proposal at such a group bargaining session that would be satisfactory to all. After geting [sic] some clarifications from the Automobile Dealers as to some of their present working conditions, we would at that time present you with a proposal covering rates of pay, hours of work and other working conditions.

The second subject concerned the settlement negotiations of a strike at Thompson Chevrolet, Inc., one of the Respondents herein. The certification in respect to that Respondent was one of the earliest issued (see attached Appendix A), and so it is among the dealers listed in the letter of July 2 and again in the one sent by the Union on July 31. In the letter sent on August 16, the Union, after suggesting "how the negotiations could be handled," further stated:

> At a bargaing [sic] session set up to settle the Thompson Chevrolet, strike, you stated that the Employers group didn't know just what they wanted to

do about bargaining yet, and it might be some time, because your counsel Mr. George Christensen wanted to make a test case of the price fixing scheme he has been harping about for so long, without any results. You stated that you thought after we filed charges for refusal to bargain that; then this would be his defense. If this is your plans I believe you are leading your clients down a long lonsome [sic] road, as we have never made any demands on you that had any resemblance to any price fixing demands. I believe this sort of action would create an undue hardship on the Automobile Dealers running to the N. L. R. B. for hearings and producing records ect. [sic], this would be a futile effort on your part.

* * *

C. Findings and Conclusions.

Without laboring the matter further, the correspondence leaves no question but that the Union duly requested each Respondent to bargain collectively with it as the exclusive bargaining representative of the employees in the unit of employees described in the Certification applicable to such Respondent (which unit is restated in par. V of the respective complaints in each instance). I make this finding quite independently and without regard to the testimony of Secretary-Treasurer Griffith of the Union, at the hearing, which confirms as the fact what would be the normal inference from the kind of silence by the Respondents which had an eloquence of its own—that Burns was indeed the agent of these dealers at least for receiving bargaining demands. At all events, it is hereby found, in respect to each Respondent, in the same manner and with the same intent, force and effect as if each said Respondent were the sole Respondent at a separate hearing, as follows:

(a) Respondent in each instance is a retail automobile dealer in the Greater Chicago area in Illinois, has a gross annual revenue of at least $500,000 and annually sells and

distributes at least $100,000 of its products outside the State of Illinois, and is engaged in commerce within the meaning of the Act.

(b) The employees of said Respondent, consisting of its salesmen (and excluding such other persons as are stated in the Certification of Representative to be thus excluded) constitute an appropriate bargaining unit within the meaning of Section 9(b) of the Act.

(c) The Union is a labor organization within the meaning of the Act.

(d) At an election by secret ballot preceding said Certification, a majority of the eligible employees in said unit designated the Union as the bargaining representative of the employees in said unit.

(e) Pursuant to the results of said election, the Board on the date stated in the Certification, and as also appears in the attached Appendix A, issued a Certification of Representative to the Union to the effect that the Union is the exclusive bargaining representative of the employees in said unit.

(f) At all times from the date of said Certification, the Union has been and has remained the exclusive representative of said employees for the purpose of collective bargaining in respect to wages, hours, and terms and conditions of work within the meaning of Section 9(a) of the Act.

(g) The Union, since on or about the dates stated in paragraph VIII of the complaint, as amended, has duly requested the Respondent to bargain with it as exclusive bargaining representative pursuant to said Certification.

(h) Said Respondent has failed and refused and continues to fail and refuse to bargain collectively with the Union, thereby violating Section 8(a)(5) and (1) of the Act.

III. Remedy.

It will be recommended that an order issue requiring each Respondent to cease and desist from its refusal to bargain with the Union in accordance with the Certification of Representative issued in respect to it, and affirmatively directing said Respondent to bargain collectively with the Union with respect to rates of pay, wages, hours of employment, and other conditions of employment of the employees in the unit described in said Certification.

* * *

Upon the foregoing findings and conclusions and the entire record in the case, and pursuant to Section 10(c) of the Act, I recommend the Board issue the following:

Order.

Each Respondent herein, with the same intent, force and effect as if in a separate case and in a separate order individually issued in respect to it, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with American Federation of Professional Salesmen as the exclusive collective-bargaining representative in the appropriate unit as stated in the Certification of Representative issued to it and restated in paragraph V of the complaint issued in respect to it (of which the unit described in the Certification issued in respect to Schmerler Ford, Inc., is typical, and allowing for such variance therefrom as may appear in the Certifications issued respectively to the other Respondents) as follows:

> All automobile and truck salesmen employed at the Employer's [naming the Respondent's particular city], Illinois, location, excluding office and plant clericals, automobile mechanics, semi-skilled help, parts department employees, guards and supervisors as defined in the Act and all other employees.

(b) Interfering with the efforts of said Union to negotiate for or represent the employees in the appropriate unit as the exclusive collective-bargaining representative.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request (see the section of this Decision entitled "Remedy"), bargain collectively with American Federation of Professional Salesmen, as the exclusive representative of the employees in the said unit, with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

(Caption—13-CA-8598)

EXCEPTIONS TO TRIAL EXAMINER'S DECISION

(Immaterial portions omitted)

3. To the finding and conclusion (TXD 9, L. 39) that the alleged union is a labor organization within the meaning of the Act, for all the reasons put forth heretofore by Respondents in all the underlying representation proceedings leading to this Trial Examiner's Decision, including the reason that the alleged union is a vehicle for a price fixing conspiracy and that affirmative action by the National Labor Relations Board to certify said alleged union, encourages and aids the unlawful price fixing conspiracy now in its incipiency, but which with each action by the Board in support of the alleged union moves nearer to an existing and effective unlawful Sherman Act conspiracy.

4. To the finding and conclusion (TXD 10, LL. 1-3) that the Respondents' failure and refusal to bargain collectively with the alleged union is a violation of Section 8(a)(5) and (1) of the Act, again for all the reasons heretofore put forth by the Respondents in all the proceedings leading to this Decision. The alleged union, if a labor organization, is not engaging in protected activity within the meaning of the Act when it is uncontradicted that it is seeking to create an anti-trust violation. Its demands for joint bargaining, rather than individual bargaining for which it was certified, serves to strengthen Respondents' antitrust contention.

5. To the Remedy (TXD 10, LL. 7-58; 11, LL. 1-3) as contrary to the evidence and to the law.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
* * (Caption—13-CA-8598, et al.) * *

DECISION AND ORDER.

On January 22, 1969, Trial Examiner A. Norman Somers issued his Decision in the above proceeding, finding that Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondents filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has considered the Trial Examiner's Decision, the exceptions and supporting brief, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

Order.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that Respondents, their officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C., April 24, 1969.

Frank W. McCulloch,
Chairman

John H. Fanning,
Member

Gerald A. Brown,
Member

National Labor Relations Board

(Seal)

OPINIONS OF COURT OF APPEALS

(Caption Omitted)

Before HASTINGS, *Senior Circuit Judge*, FAIRCHILD and CUMMINGS, *Circuit Judges*.

CUMMINGS, *Circuit Judge*. This petition is to review an order of the National Labor Relations Board concluding that petitioners each committed an unfair labor practice by refusing to bargain collectively with the American Federation of Professional Salesmen (the "Union"), in violation of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (29 U.S.C. §§ 158(a)(1) and 158(a)(5)).

Petitioners are 24 automobile dealers in the metropolitan Chicago area. In 1968, pursuant to Section 9(c) of the Act (29 U.S.C. § 159(c)), the Union filed petitions seeking to represent the salesmen at each of these automobile dealers. In April and May 1968, following hearings before a hearing officer of the Board, the Regional Director ordered elections to be held among the employees after finding that the Union was a labor organization within the meaning of Section 2(5) of the Act (29 U.S.C. § 152(5)).

Petitioner automobile dealers requested the Regional Director to dismiss the Union's petitions for representation on the ground that the Union was conspiring to violate the Sherman Act. The dealers showed that they had received letters of demand for recognition from the Union in January and February 1968, in which the Union stated that its proposed collective bargaining agreement "could guarantee you, and all the dealers in the area, a minimum net profit (I repeat NET), equal to 3% of the list price of the unit [automobile]." This language was omitted from subsequent demand letters. In literature distributed to various automobile salesmen, the Union stated they should join "[t]o put your employer back into the retail business by guaranteeing him a net profit, after

all expenses are paid, equal to 3% of the list price." The Union discussed its possible pricing formula at an organizing meeting on January 28, 1968, giving the following example for a car invoiced by the factory to the dealer at $3,120:

> "To this invoice of $3120 we would add one quarter of one per cent for our health and welfare program, which is $10. We would add another one quarter of one per cent for our retirement program, which is another $10. We would add 4½ per cent as the sales commission, which is $180. We would add 2 per cent for the service, get-ready, advertising, and office expense of the dealer, which is $80. We could then guarantee the dealer a minimum profit equal to 3 per cent of the list price of the car, which is $120.
>
> "We could guarantee this and we would guarantee it by Article 8, which is the one I didn't read before.
>
> "Article 8 of our [collective bargaining] agreement would read as follows:
>
> > 'Salesmen will not be required to sell a new motor vehicle at a price less than 12 per cent off the list price less transportation and delivery of the motor vehicle. We take the 12 per cent off and we are right down to this figure of $3520'."

In denying the dealers' motion to dismiss the petitions for representation, the Regional Director stated that it was speculative whether the Union, if selected as the salesmen's bargaining representative, would actually seek to incorporate this pricing formula into a collective bargaining agreement. He concluded that since the Union qualified as a labor organization within the meaning of Section 2(5) of the Act, the Board should process the representation petitions. He did not indicate, however, that the Union's proposal was valid under the Sherman Act.

The antitrust issue was again raised in the dealers' petitions to review the Regional Director's order, but the

Board concluded that these petitions raised no substantial issues warranting review and therefore denied them. In the ensuing elections, the Union received a majority of the ballots counted and was certified as the exclusive bargaining representative of petitioner's salesmen.

As the certifications issued, the Union requested the dealers to commence negotiations for a collective bargaining contract, but its communications were unanswered. Therefore, the Union filed charges with the Board alleging that petitioners each committed an unfair labor practice by refusing to recognize it and bargain collectively with it. In November 1968, a trial examiner conducted a hearing with respect to the unfair labor practice alleged in the complaints filed by the Board's general counsel. In their answers the petitioners denied that the Union was a labor organization within the meaning of Section 2(5) of the Act and asserted that its certification was invalid primarily because of its price-fixing program. The trial examiner rejected these contentions. As to whatever collective bargaining agreement the Union might propose, the trial examiner stated "the Employer could dispose by saying nay to price fixing and aye to working terms and conditions." He also noted that the Board had already rejected the dealers' price-fixing contention in the representation proceedings. The findings, conclusions and recommendations of the trial examiner were adopted by the Board, and it simultaneously overruled the dealers' exceptions. Consequently, the dealers were ordered to cease and desist from the unfair labor practices found, to bargain collectively with the Union and to post the customary notices. 175 NLRB No. 90 (1969).

Absent an affirmative defense, petitioners' adamant refusal to bargain collectively with the certified representative of their employees clearly violates Sections 8(a)(1) and 8(a)(5) (29 U.S.C. §§ 158(a)(1) and 158(a)(5)). Petitioners no longer contend that the Union is not a labor organization within the purview of Section 2(5) of the Act (29 U.S.C. § 152(5)). Rather, they present

a dual attack — first against the validity of the Union's election and then the propriety of granting recognition to the Union as bargaining representative in light of the proposed price-fixing scheme.

Initially, the Board objects that petitioners should be barred from challenging the election results because of their failure to file objections thereto within the five-day period required by the Board's Rules and Regulations (Series 8, Section 102.69(a)). *National Labor Relations Board* v. *Conlon Bros. Mfg. Co.*, 187 F.2d 329, 332-333 (7th Cir. 1951). In exceptional circumstances, however, this Court has considered objections to elections lodged after expiration of that period. *National Labor Relations Board* v. *Fresh'nd-Aire Company*, 226 F.2d 737, 741-742 (7th Cir. 1955). In this case, the dealers presented objections to the Regional Director and the Board prior to the representation election. Their failure to reassert their antitrust point in post-election proceedings until their answers to the unfair labor practice Complaints should not preclude them from raising the same point in the unfair labor practice proceedings or before this Court. They may not, however, go beyond the issues thus raised and advance additional allegations and evidence pertinent to the representation proceedings. *Rockwell Mfg. Co., Kearney Div.* v. *National Labor Relations Board*, 330 F.2d 795, 797-798 (7th Cir. 1964), certiorari denied, 379 U.S. 890; see *National Labor Relations Board* v. *Golden Age Beverage Company*, 415 F.2d 26, 32-33 (5th Cir. 1969).

Within these confines we turn to consider the dealers' arguments. They first contend that the election was invalid because the Union's campaign propaganda contained descriptions of the pricing proposals which allegedly misled the employees and prevented a fair election. Even assuming that the proposals persisted after the Union filed its request for an election, nothing in these proposals warrants setting aside the certification election as unfair.

The Board is not a censor over the campaign propaganda circulated by either union or management during a representation election. *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 60-61. Correction of deceptive or untruthful statements is left primarily to the participants themselves and the good sense of the voters. *National Labor Relations Board* v. *Red Bird Foods, Inc.*, 399 F.2d 600, 602-603 (7th Cir. 1968); *National Labor Relations Board* v. *Golden Age Beverage Company*, 415 F.2d 26, 31 (5th Cir. 1969). The Board intercedes to set aside elections only when improper campaign tactics touch material matters and create a climate which thwarts the employees' free choice and distorts the electoral process. *Gallenkamp Stores Co.* v. *National Labor Relations Board*, 402 F.2d 525, 533 (9th Cir. 1968); *Aerovox Corp. of Myrtle Beach, S.C.* v. *National Labor Relations Board*, 409 F.2d 1004, 1007 (4th Cir. 1969); *Southwest Portland Cement Company* v. *National Labor Relations Board*, 407 F.2d 131, 134-135 (5th Cir. 1969).

In determining whether an election has been unfair, the accused conduct must be considered with reference to the "timing, proportion of employees affected and the character" of the claimed coercive or misleading action. *Rockwell Mfg. Co., Kearney Div.* v. *National Labor Relations Board*, 330 F.2d 795, 797, (7th Cir. 1964), certiorari denied, 379 U.S. 890. In this case, the dealers have not objected to a misrepresentation of fact or even of law. Their contentions pertain to certain of the Union's proposals, assertedly illegal, which were advanced as potential elements of a collective bargaining agreement. There is no actual evidence of the prominence of the illegal proposals in the overall campaign of the Union or of the number of employees to whom these proposals were communicated. The record contains no indication how long these assertions persisted after the petitioners objected to the illegality of the scheme. There is no proof that the scheme won the election for the Union. There is no suggestion that the Union cynically suggested a pricing program which is considered illegal in the hopes of mis-

leading voters. Cf. *United Electrical, Radio and Machine Workers* v. *National Labor Relations Board*, 409 F.2d 150, 158-159 (D.C. Cir. 1969). Long before the election, the dealers here were well aware of the propaganda proposals and were free to respond by pointing out any defects, legal or otherwise. *National Labor Relations Board* v. *Red Bird Foods, Inc.*, 399 F.2d 600, 602-603 (7th Cir. 1968); *National Labor Relations Board* v. *Golden Age Beverage Company*, 415 F.2d 26, 31 (5th Cir. 1969). Effective rebuttal was not hampered by the legal, rather than factual, character of the dispute. Under these circumstances, we can only conclude that the petitioners have failed to satisfy their burden of proof in this Court that the representation election was unfair and the Board's certification of the Union arbitrary. *National Labor Relations Board* v. *Mattison Machine Works*, 365 U.S. 123; *Follett Corp.* v. *National Labor Relations Board*, 397 F.2d 91 (7th Cir. 1968); *Macomb Pottery Company* v. *National Labor Relations Board*, 376 F.2d 450, 453 (7th Cir. 1967).

Apart from the election process itself, petitioners contend that the Union's role in allegedly fostering an illegal price-fixing scheme renders it unfit to act as the bargaining agent of these employees and that the Board should deny recognition to the Union. Whether considered as a ground for denying a representation election[1] or as an independent justification for the refusal to bargain about wages and conditions of employment, we find this argument without merit.

The National Labor Relations Act was intended to encourage the formation and development of private means for the settlement of labor disputes through collective bargaining between management and the employees' representative. 29 U.S.C. § 151. The Act establishes a strong public policy favoring the free choice of a bargaining agent by employees which should not lightly

[1] See *Intertype Company* v. *National Labor Relations Board*, 401 F.2d 41, 43 (4th Cir. 1968), certiorari denied, 393 U.S. 1049.

be frustrated. 29 U.S.C. §§ 151, 157; *National Labor Relations Board* v. *David Buttrick Company*, 399 F.2d 505, 507 (1st Cir. 1968).[2] Denial of recognition to the Union would run counter to these firmly established policies. It would not only nullify past efforts at organization, but would also impede future effective exercise of the employees' rights to organize and engage in concerted activities protected by Section 7 (29 U.S.C. § 157). It would foreclose not only a potentially illegal arrangement but also legitimate negotiation and settlement of disputes over wages and conditions of employment.

Neither public antitrust policy nor the proper interest of petitioners warrants this interference with bargaining. Antitrust enforcement does not call for the sweeping and drastic sanction of union nonrecognition. Cf. *Leedom* v. *International Union*, 352 U.S. 145, 150. The dealers are not compelled to enter into any agreement violative of the Sherman Act. Nor are they foreclosed from a timely presentation of the questions whether a price scheme constitutes a mandatory subject of bargaining and, if so, whether the particular scheme violates the antitrust laws.[3] A decertification proceeding under Section 9(c) (29 U.S.C. § 159(c)) would also be available if it appears that a majority of the year. *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 613. These procedures adequately protect the dealers and public from a possibly illegal price-fixing scheme without the needless disruption of labor-management relations. *Local 1976, Carpenters' Union* v.

[2] Unlike the present case, those instances relied upon by petitioners in which the Board has denied recognition of the chosen union involved a conflict of interest or some other indication that the union could not fairly perform its fiduciary function as representative and bargaining agent of its members. See, *e.g.*, *Alaska Salmon Industry*, 78 NLRB 185 (1948); *American District Telegraph Co.*, 89 NLRB 1535 (1950); *Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954); *General Teamsters, Local 249*, 139 NLRB 605 (1962); *Iowa Packing Co.*, 125 NLRB 1408 (1959).

[3] Thus petitioners could themselves institute proceedings against the Union under Section 8(b)(3) (29 U.S.C. § 158(b)(3)) should they feel that the Union unfairly insists upon an unfair or illegal item in bargaining. Without expressing any opinion on the merits of the antitrust allegations, we note that the Board approved the trial examiner's ruling that petitioners need not bargain on price-fixing.

National Labor Relations Board, 357 U.S. 93, 108-111; cf. *Southern S.S. Co.* v. *National Labor Relations Board*, 316 U.S. 31, 47; *H. L. Washum*, 172 NLRB No. 40, 61 *et seq.*, 68 LRRM 1535, 1539-1541 (1968). The policy of the National Labor Relations Act favors a minimum of governmental interference and the Board is properly reluctant to intrude into the realm of union-management relations until necessary. Here petitioners refused to bargain on any subject before any proposal, legal or illegal, mandatory or permissive, had been presented by the Union. This refusal was precipitous and excessive. *Minnesota Mining and Manufacturing Company* v. *National Labor Relations Board*, 415 F.2d 512, 522-523 (2d Cir. 1969).

The petition for review is denied; enforcement of the order of the Board is granted.

FAIRCHILD, *Circuit Judge*, concurring.

My conclusions on the critical issues are as follows:

(1) According to the record of the January 28, 1968 meeting, the union proposed to agree with a number of competing employers that none of them would sell a car for less than a price computed by the specified formula. I have no doubt that such agreements would have been unlawful, and I think the board and its officers had a duty to recognize that fact.

(2) The illegality of the proposed device did not conclusively establish that the union was not a labor organization under the act. The regional director's failure to require the disclaimers or similar precautions suggested by the employers, before ordering an election, was not an abuse of discretion.

(3) The record does not disclose the circumstances of the campaign immediately preceding the election. We do not know the extent to which the union pressed its proposal, the extent of information the employees received

as to its illegality, nor circumstances indicating probability that it had a significant effect. It has not been established that the election and resulting certification ought to be disregarded. The fraud, if any, was on the employees, not the employers.

(4) I can concur in enforcement of the bargaining order on the ground that it is implicit, without express modification, that if the union proposes agreements fixing minimum prices, the employers will have no duty to bargain.

HASTINGS, *Senior Circuit Judge*, dissenting.

With deference to my distinguished colleagues in the majority, I dissent from their conclusions on the antitrust issue raised by the employer-dealers throughout this proceeding. The majority adequately sets out the contents of the challenged price-fixing proposal and it need not be repeated here. The general propositions of law relied upon by the majority may be accepted without much dispute. However, I have been unable to accept their application to the facts of the case before us.

I agree with the majority that the employer-dealers' antitrust challenge to the elections is properly before us. This challenge was vigorously pressed at every step leading to the elections and was consistently brushed aside by the Board. Raising the same contention once more as a post-election objection would have been a futile gesture.

I further agree with the majority's implicit recognition that the Board is competent, *under proper circumstances*, to consider questions of antitrust law as they relate to its responsibilities under the Labor Act. The Board, in its brief in a companion case, No. 17325, *Borek Motor Sales, Inc.* v. *N.L.R.B.*, ... F.2d ..... (1970), concedes, "It is, of course, true that the Board in administering the Labor Act cannot completely close its eyes to violations of other statutes which may come to its attention

or which are enmeshed in the factual situations in which the Board must pass * * * [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.' *Southern S.S. Co.* v. *N.L.R.B.*, 316 U.S. 31, 47 (1942)." In *H. L. Washum*, 172 NLRB No. 40 (1968), the Board considered the merits of a charge that a contract it was ordering reinstated violated the antitrust laws. Thus it appears that the central question before us is whether the alleged antitrust violation was prematurely presented to the Board.

The majority suggests two reasons for not denying enforcement. First, it is said that the Board properly refused to consider the employers' antitrust contention before the election because Board intervention to correct improper campaign tactics is warranted only in exceptional cases and that in all others, the proper remedy for an aggrieved party is "counter-propaganda."

The short answer is that *this is an exceptional case* warranting Board action. The cases cited by the majority for the usual rule are simply different from that before us. In some, the alleged misrepresentation was trivial or of only doubtful impropriety. In others, it was highly speculative whether the alleged misrepresentation had any effect on the election outcome. In each case, a single union and one employer were involved and access to employees for counter-propaganda presented no problem for either party. And finally, all of those cases dealt with challenges made only after the election was held so that the only remedy the Board could have granted for the alleged wrong would have been to set aside the election.

The instant case is significantly different in each respect. Here the misrepresentation was neither trivial nor of doubtful impropriety. The Union proposed a panacea for problems that had long troubled employers and employees

alike. It said it would secure benefits for the employees and would not harm the business of the employers in the process. It contended that it would in fact do a great service to the dealers by making it possible for them to eliminate the severe competition that had been holding their profits to a minimum. This was a proposal of clear appeal.

However, it was also one that the Union certainly could not implement because of the antitrust laws. The Union's pricing scheme, if implemented, would be a clear *per se* violation of the Sherman Act. The crux of the proposal is that the Union would, through its collective bargaining agreement, participate in fixing a minimum price, below list, at which all automobiles in the Chicago area would have to be sold. The purpose of such price-fixing would be to guarantee the employer-dealers a minimum profit of three percent on each car sold.

"Congress feared the concentrated power of business organizations to dominate markets and prices. It intended [by the Sherman Act] to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act." *Allen Bradley Co. v. International Brotherhood of Electrical Workers*, 325 U.S. 797, 811 (1945). The dealers who were to be involved in this price-fixing scheme were clearly a "non-labor group." *Cf. American Federation of Musicians v. Carroll*, 391 U.S. 99 (1968). But assuming *arguendo* that they were not, a violation still exists because the proposed scheme was not intended to compensate the dealers for their labor services in competition with salesmen but was calculated to give them an "entrepreneurial profit." *See Musicians v. Carroll, supra*, 391 U.S. at 110 n. 10.

Also present in the instant case is evidence that this clearly improper proposal had a substantial effect, not only on the outcome of the election, but on the very ability of the Union to get the required showing of interest to hold the election. The record before us and before the

Board shows that the Union had been trying to organize automobile salesmen in the Chicago area since 1961, apparently without much success. The campaign that led to the present cases began early in November, 1967, and had the support of the Communications Workers of America, AFL-CIO. It also seems to have faltered, for in January, 1968, the AFL-CIO withdrew its support. It was at this point, on January 28, 1968, that the succeeding Union group first proposed its pricing scheme which it touted as a method to secure greater financial benefits for salesmen while at the same time saving employers from the harsh competition in the Chicago area. The prospects for the Union immediately brightened. Numerous representation petitions were filed. The number finally rose to between 80 and 90, covering dealerships widely scattered in Illinois and Indiana.

This then suggests another reason for considering the instant case exceptional. Here 80 or 90 widely scattered employers were faced with the organized campaign of a single Union. They might reasonably have concluded that the usual weapon of counter propaganda would be ineffective in this situation; or at least that such propoganda would not be adequately prepared and dispersed in the time remaining before the elections.

However, and finally, the employers did not then simply sit back idly to await the outcome of the elections before raising any objection. Instead, they immediately went to the Board with two alternative proposals. They asked that either the Union be required to obtain another showing of interest after disavowing the alleged price fixing scheme, or that the elections be delayed until the Union submitted proof that it had informed all those who signed authorization cards that it had abandoned its pricing proposal. In my judgment, this procedure was not unreasonable in the circumstances and neither we nor the Board should insist that counter-propaganda was the only acceptable pre-election method for dealing with the problem faced by the dealers. The point is that the employers acted

before the election when it was possible to remedy the problem without setting aside an election on the basis of hindsight.

In sum, in light of the obvious illegality of the Union proposal, the early and reasonable request of the employers for assistance, the ease with which the Board could have remedied the clear abuse, the possible inefficacy of counter-propaganda and the evidence of the effect of the proposal on the organizational campaign, it seems that it was a clear abuse of discretion for the Board to permit the elections to proceed without taking any steps to insure that the free choice of the employees was not distorted by the proposed illegal pricing scheme.

The second reason advanced by the majority for not denying enforcement is that until the Union actually presses its illegal proposal in collective bargaining no harm can result from the election having been held. As I read the record before us this approach ignores the realities of the situation. I am convinced that the Union, unable to secure adequate employee support in any other way, won the election on the strength of its illegal proposal. It should not thereafter be given the opportunity to purge itself by the simple expedient of renigging on its major campaign promise. The net result of this would be to enable the Union to get its foot in the door and thereafter to assume recognized bargaining status for at least one year. The taint that has pervaded the entire representation process thereby would be brushed aside. To such an anomalous result I am unwilling to subscribe.

All parties seem to suggest that this particular problem is presently without judicial precedent. It would not be enough for me to say now that future collective bargaining in this case shall not encompass illegal price-fixing. Rather, I would hold that elections already held, under the circumstances found present here, should be set aside. No other adequate remedy is presently available.

In my considered judgment the petition to review and set aside the order of the Board should be granted and the cross-application for enforcement denied.

NATIONAL LABOR RELATIONS ACT

(61 Stat. 136, 29 U.S.C. 151 et. seq.)

SEC. 7. Employees shall the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

SEC. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

SEC. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer

and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * *

SHERMAN ACT

(26 Stat. 209, 15 U.S.C. 1 et seq.)

SEC. 1. Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

EXCERPTS FROM TESTIMONY OF ROBERT CAMERON AND RELEVANT COLLOQUY FROM FENCL-TUFO CHEVROLET REPRESENTATION CASE

95 Hearing Officer: Would you care to state your position at this time as to labor organization for the record, or do you want to save it?

Mr. Christensen: Well, I think I had better move to dismiss all the petitions. And I do so move, upon the ground that it's apparent that this organization, although meeting some of the technical requirements of the statutory definition of a labor organization, has the primary purpose to achieve this end through what is a price-fixing formula. It is abhorrent to the Sherman Act. The area covered is so large—the vast metropolitan area—that there can be no question of the adverse affect of this upon commerce, the impact of this upon commerce within the area.

We are not dealing with a single agency, we are dealing with a program involving six counties, so that application of the Sherman Act, assuming a violation is very clear, and there cannot be any doubt that the
96 program that this organization has embarked upon, that it has embraced in every so-called letter or demand, is abhorrent to the Sherman Act. Even in the Jewel Tea case the Supreme Court pointed out that this kind of thing carried out under the guise of collective bargaining is not immune to the anti-trust laws, so the Board is faced with a policy question here as to whether it will foster and hold elections for an organization that has this intent and purpose.

You would not, or it would not hold elections for any *per se* illegal enterprise. I have never known it

to conduct elections among the employees of houses of prostitution, for example. You have no hesitation in throwing such a petition out. While the customers of the prospective conspiracy may be somewhat different, the one is as illegal as the other, and the Board must make a decision here as to whether it is going to aid in the taking of the first step in a price-fixing conspiracy.

It's all very well to say, as one of these gentlemen did, "Well, if we do this, then you run to the anti-trust division and get us indicted or get us indicted," but this Board is supposedly, and it's going to have an opportunity to demonstrate whether it is, a responsible agency of the Government.

We have an anti-trust policy that is as strong as our labor policy; and if this organization is to function at all, it can only do so if this Board puts its arm around it and orders an election, and, presumably, it might win. And then ordering us to go in and resist illegal demands. I suggest that is an irresponsible way for any government agency to act.

The Board has been rebuked a good many times because it keeps its eye only on the Labor Act and disregards laws against mutiny and other things. Here, there can be no doubt that you have had three or four men get together and conspire, these officers, these fellows who have been promoting this, have already conspired with each other to embark upon this program. Carried to fruition, of course, they must get some employers; and they seek your help in getting employers in, and I don't think the Board has any right to say, "They say they will admit employes to membership and they say they want to deal over wages and commissions. That's enough for us. Whatever else they want to do we will close our eyes to that," because you could do that in the whore house case that I talked about; and I think the Board's got to make up its mind whether it's going to support the organization of whore houses and price fixing.

100 Mr. Cameron: May I make a couple of comments on Mr. Christensen's motion, please?

Hearing Officer: Sure. You have made an appearance here. You may speak.

Mr. Cameron: To begin with, as far as any conspiracy is concerned, I have been responsible for all printed matter, anything that's been written down in the name of the union [was] written down by me.

Hearing Officer: You shouldn't admit that, Mr. Cameron, but go ahead.

Mr. Cameron: Well, I want to admit it, and I assume any responsibility for any alleged conspiratorial activities, but I think it's a rather weird conception of a conspiracy when a person gets up in front of 500 people to discuss something and then sends material out in the U.S. mails to another 50 people. It's rather open and above board conspiracy, if it could even be remotedly considered a conspiracy.

101 We have nothing to do and would have nothing to do now, or any time in the future, anything to do with the fixing of prices.

What we propose in this thing was a fixing of costs which any collective bargaining agreement by any organization fixes, the cost of labor and what it's going to cost to have wages, what it's going to cost to have health and welfare, and so on, and this is something that we plan to carry on after we win these elections with the employer's association.

One of the main reasons why we have this union and the main reasons why men have joined this union is because of the fact that in the past 10 years the automobile retailers have been wholesaling the cars we think should have been retailed. In fact we seem to be in the retail business.

The market has depressed the prices in many cases where it's virtually impossible for salesmen to make a good living because of the current pay plan which offers them a percentage of the profit, which has become a most scarce thing because there just haven't

been decent profits in the business except in rare instances.

And prior to our meeting of January 28th, in fact, an article appeared, it might have been the same
102 morning, an article appeared in one of the local metropolitan dailies purporting to be a interview between two automobile dealers discussing how it's impossible to attract talented young men to the business, and that what the automobile industry needs is a unified, area-wide health and welfare and retirement program, and that's one of the reasons why they can't attract the top talent in their business.

And, as far as the purposes of this union, they always have and they always will be to unite the men to improve the terms and conditions of their employment and to upgrade the profession of selling automobiles; and if it falls out of that a decent net profit to the employer, well, so be it.

We don't make apologies for employers making profits. They are entitled to them.

* * *

165 The Witness (Cameron): I first described this plan to our membership in answer to questions that were raised at our meeting of the 28th of January. I went up to the blackboard before the meeting started and laid—

Hearing Officer: I think you have answered it.

Mr. Christensen: Just one more question along that line.

Q. (By Mr. Christensen) Apart from the meeting when the whole membership was there, had you ever described it to any members or prospective members before that time? I am assuming you had. You said questions had been raised and you were going to answer them at this meeting. Can you recall when you first announced this?

A. In our literature. It was printed—most of this
166 information was in our promotional brochure on the union.

Q. I don't want to go too far.

Had you told it to people you talked with, let's say from the 15th of January, to, by the time you got these new cards printed, told them what this plan—

A. What plan?

* * *

Hearing Officer: What Mr. Christensen wants to know, Mr. Cameron, is had you discussed this plan in regard to the profit, the dealers profit, which is generally what Mr. [Christensen] is referring to, had you discussed this plan with prospective members prior [sic] to the meeting of January 28?

The Witness: No, I haven't discussed it with prospective members subsequent [sic] to the meeting of January 28.

As far as—I would like to have a chance to elaborate, because the language alone, it doesn't make any sense.

Q. (By Mr. Christensen) On February 5th you sent a letter to the McAnary Chevrolet in which you referred to your plan then and guaranteed a minimum net profit. And on January 28 at your membership
168 meeting you discussed it with the members, whoever they may be or were at that meeting, as shown on Pages 15 and 16.

A. It's dependent again on what you call my plan.

Q. Had you discussed anything?

A. Anything in there was not discussed prior to the 28th.

Q. I thought you told me you had had questions about it before the meeting

A. Before the meeting got underway.

Q. That's why you put it on the board?

A. Um—huh.

Q. How did anyone know enough to ask you questions about it?

A. Do you want me to answer you?

Q. Yes.

A. The questions were not involving any dealers profits, as I started to tell you. The dealers profit is a fall out that would result from the commission plan and that is what we had questions about. Many men could not understand how they could receive four to five percent commission on cars when they were normally delivering cars for profits equally—equalling approximately two, three percent of the invoice, which is a reasonable question.

Q. On that night did you then tell the people who were assembled, you could guarantee a dealer a minimum profit equal to three percent of the list price
168 of the car, "We could guarantee this and we would guarantee it, by Article 8, which is the one I didn't read before?" That's what you told him that night, didn't you?.

Mr. Griffith: Don't answer that. I object to that. That's all been gone over.

Hearing Officer: I'll sustain the objection.

Q. (By Mr. Christensen) Now, how many people were at that meeting?

Mr. Griffith: I object to that, I object to that because Mr. Cameron didn't count them.

Mr. Christensen: To the best of your judgment. I don't expect them to be—

Mr. Griffith: That's a union function, how many.

Hearing Officer: I'll sustain the objection.

I have no objections to your going into whether or not there were salesmen at the meeting.

Q. (By Mr. Christensen) Let me ask you, without precise numbers, there were a goodly quantity of salesmen present at the meeting?

A. There certainly was.

Q. After that explanation did you pass out applications for membership?

Mr. Griffith: I object.

Mr. Christensen: And secure your position that night?

Mr. Griffith: I object. That's a union function,
169 Mr. Hearing Officer, and if you are going to let this—

Hearing Officer: Sustained.

Q. (By Mr. Christensen) I am not going to ask you of the total number of cards that you have on file with the [Board] in these consolidated cases, but I am asking you, in your judgment, what percentage of them were obtained at or after that meeting of January 28th?

Mr. Griffith: I object to that.

Hearing Officer: I'll sustain the objection.

Mr. Christensen: Well, if it please the Examiner, we now go to a phase of the same problem of legality—illegality that runs throughout and underlies this entire proceedings. If I could be heard for just a moment.

Hearing Officer: I'll be glad to listen to you.

Mr. Christensen: These cards, I think if the witness is permitted to answer and if the Board will examine the dates on the cards, will demonstrate that the great bulk of them were obtained by an illegal promise. I don't care whether you call it fraud or whether you call it an invitation to participate in a price fixing conspiracy. The conduct is illegal.

* * *

170 I think the investigation will reveal and this Board should go into it fully, most of these, if not all of these cards were obtained on the promise of these people on a program to engage in an illegal price fixing conspiracy and the Board is faced with this problem, if a union man in an election campaign misstates a fact or lies, and there are cases, elections have been set aside, on just plain lies. Say, "We are getting $5 and over an hour at this factory," and it isn't so; the Board has set aside elections under such false facts.

These cards were illegal or fraudulently obtained under illegal representation that they could guarantee

these wages because they could guarantee a minimum price structure that would permit them.

If, [discounting] all the other arguments we have advanced, this Board was so foolish as to order an election here and if people were foolish enough to vote for this union, such an election would be contested because this union has not disavowed this program. These people will still be voting under this.

What do you expect us to do, assuming you ordered an election and this program of price fixing is not disallowed? If these employers have any sense and they have a perfect right, of course, to urge their
171 people to vote against this thing, they will tell them, "This is illegal, this is illegal under the Sherman Act and Mr. Cameron can't deliver. If we were to go into that kind of deal we would go to jail."

Does this Board want to have an election looking right ahead at that thing that is bound to occur? This Board knows as well as anyone in the country, it proclaims its expertise, what a labor organization can and cannot do. [The Union] cannot engage in price fixing with employers, let alone the whole program to the solicitation of cards right from the beginning.

If you would permit me to explore this, I think the Board ought to investigate this and not have to be prodded by us. This Board has a responsibility to see no laws are broken, as well as this one. We have been told that by the Courts time and time again.

I can't make this proof except through hostile witnesses, but there is enough in this record now on this time sequence to indicate to any reasonable, intelligent person that the cards you have got, whether they amount to 30 percent, 20 percent, or 50 percent of the union are tainted with fraud and illegality.

And I move that all of the cases be dismissed and that the cards be impounded. This Board should nip this price fixing conspiracy in the bud and not be returned.

The Board has got to make a decision. I know of
172 no precise precedent for this type of thing because no one that I've ever heard of has been so foolish to do what these gentlemen have done, to openly, blatantly advertise price fixing and try to woo employers in by saying, "We'll guarantee you three percent."

The only thing I heard yesterday was the thing you always hear from a would be price fixer, "The market is in disarray, the competition is so tough it's driven down prices where nobody is making enough money. Let's all get together, boys, and put some floors in here and we'll all be happy." That's a dime a dozen. It's been heard in every price fixing case there is. "We are going to do everybody good except the public."

So, I believe I should be allowed to continue this examination, and whether I am or not, I move that all of these cases be thrown out because no numerical counting of cards will tell you there is a legal showing of interest. This record shows, whatever interest there might be, except, perhaps, for a few cards, obtained a few days before the 28th of January, all the rest of them are tainted with illegality.

Hearing Officer: Would you move to dismiss based on any interest that might have been obtained after January 28th?

Mr. Christensen: Yes, on that date, on that day or after it.

173 Mr. Griffith: Mr. Examiner, I would like to request that Mr. Christensen's entire statement here, accusing the union of price fixing, some of the statements he made, that the entire statement be stricken from the record. It has no bearing. He went over the request yesterday—the petition [should be] dismissed. All this has no bearing. He only added insulting remarks and only on his opinion. He has no proof. He has shown no proof of such a thing. Therefore, I request that the entire statment be stricken from the record.

Hearing Officer: I am not going to strike the statement from the record. I would refer his motion to the Director for ruling.

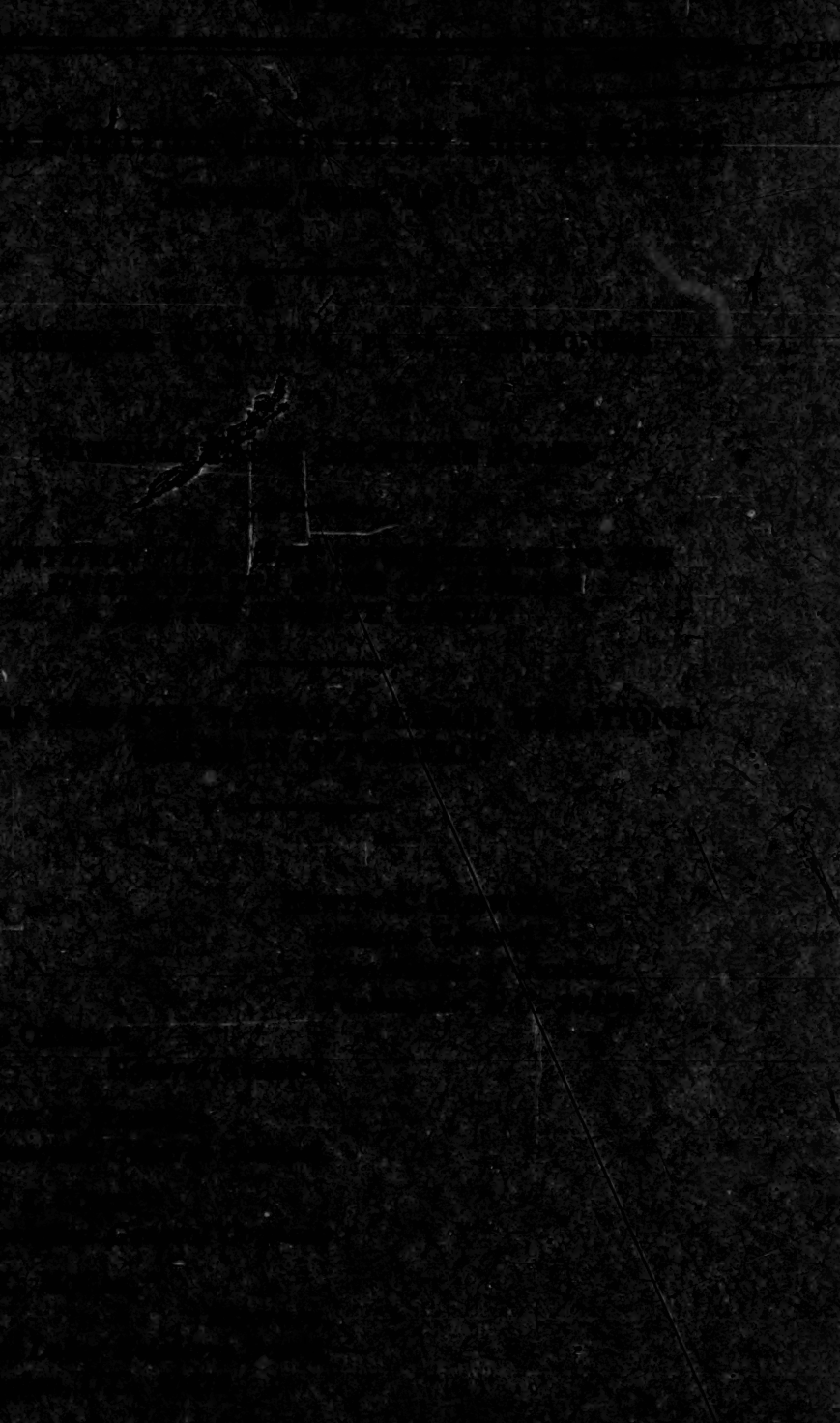
* * *

176 Mr. Christensen: The Board is now in this position; these cards were obtained under—whether you call it false, illegal or mistaken representation to salesmen, that this campaign was not going to hurt the boss, that we were going to guarantee him three percent and the boss was so told, and I have no doubt that many salesmen signed these under the feeling—well let's go along with this; "These guys have found a way to make life pleasant for everybody. It won't hurt the agency."

One or two things are indubitably true. Either these cards were obtained on that representation, which is illegal, people were deceived in getting them. This Board ought to stop it. Or, the Union intended
177 to go ahead with its illegal plan and force price fixing that will make everybody except the public happy.

In either event, there is no way you can cut this thing that makes these cards valid cards.

The Board ought to have the courage to step in and stop it.



In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 249

SCHMERLER FORD, INC., *et al.*, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals enforcing the Board's order (Pet. App. 33a-46a) is reported at 424 F. 2d 1335. The Board's decision and order (Pet. 18a-30a, 32a) are reported at 175 NLRB No. 90.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on May 13, 1970. The petition for a

writ of certiorari was filed on June 11, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that the union's pre-election statements that it would seek to incorporate a "price-fixing" arrangement in any collective agreement ultimately negotiated with the employer, neither impaired the representation election which the union subsequently won nor automatically justified the employer's refusal to recognize it as the bargaining representative of his employees.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition (Pet. App. 46a), and as follows:

Sec. 2. When used in this Act—

* * * *

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

STATEMENT

In early spring of 1968, the Union [1] filed with the Board's Regional Director petitions for representation elections among the salesmen at each petitioner's automotive dealership in the Chicago area (Pet. App. 19a; R. 25, 29).[2] Based on the records of the hearings held on those petitions, the Regional Director found that the Union was a labor organization within the meaning of Section 2(5) of the Act and directed elections among employees in various separate units; he rejected petitioners' contention that the Board should deny its processes to the Union because the latter was engaged in a price-fixing conspiracy (Pet. App. 2a-8a).[3] The Regional Director noted that the

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[1] American Federation of Professional Salesmen, Local 5056, unaffiliated.

[2] "R." refers to the joint appendix filed in the court below.

[3] Petitioners contended that, although the Union might technically fulfill the statutory requirements of a "labor organization," the Board should not lend its processes to such an organization because it was engaged in "a bold conspiracy to foist an unlawful price-fixing program on the automobile dealers in the six-county Chicago area" (Pet. App. 3a). In support of their contention, petitioners relied on (a) discussions at a Union meeting of January 28, 1968, of a possible pricing formula to be proposed to employers in contract negotiations (Pet. App. 5a; R. 9, 37, 85, 86); (b) Union letters sent to some employers in February 1968, in which the Union claimed majority status, requested recognition, and also stated that the employer should find out how the Union's proposed collective bargaining agreement "could guarantee you [the employer], and all the dealers in the area, a *minimum* net profit (I repeat NET) equal to three per cent of the list price of the unit" (Pet. App. 5a; R. 84-85); and (c) Union

Act accorded employees wide latitude to select any representative that they desired, and that it was entirely speculative whether the Union would be chosen by a majority of any company's employees, and, if selected, whether it would actually seek to incorporate its allegedly illegal "price-fixing" plan into a collective bargaining agreement (Pet. App. 6a). Petitioners sought Board review of the Regional Director's determination, but the Board denied each request on the ground that it raised "no substantial issues warranting review" (Pet. App. 18a).

In the subsequent elections, the Union received a majority of the votes cast at each petitioner's place of business, and was duly certified as the exclusive bargaining representative in each unit (see, *e.g.*, R. 52, 87). Thereafter, the Union requested bargaining with each of the petitioners, but received no response (R. 40-45; 88-95). The Union filed unfair labor practice charges with the Board, and complaints were issued thereon (R. 32; 24, 29). Each employer's answer denied that the Union was a labor organization within the meaning of Section 2(5) of the Act and that the Union was the employees' exclusive bargaining representative, alleging that the Union's certification was invalid because of "the reasons asserted in the representation proceeding" (Pet. App. 23a-24a).

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literature distributed to various automobile salesmen during the organizing campaign stating that the salesmen should join the Union to "put your employer back into the retail business by guaranteeing him a net profit, after all expenses are paid, equal to three percent of the list price" (Pet. App. 5a; R. 37-38, 59, 60).

The Board, adopting the Trial Examiner's decision, found that the Union was a labor organization within the meaning of Section 2(5) of the Act, that the Union had duly requested each petitioner to bargain, and that each, by refusing to do so, had violated Section 8(a)(5) and (1) of the Act (Pet. App. 27a-28a, 32a).[4] The Board ordered petitioners to cease and desist from the unfair labor practices found, to bargain collectively with the Union upon request, and to post appropriate notices (Pet. App. 29a-30a, 32a).

The court of appeals (Judge Hastings dissenting) sustained the Board's findings and enforced the Board's order (Pet. App. 33a-46a). The court held that petitioners had failed to satisfy their burden of establishing that the Regional Director abused his discretion in directing the representation elections (Pet. App. 37a-38a, 40a-41a), and that petitioners' refusal to bargain before "any proposal, legal or illegal * * * had been presented by the Union * * * was precipitous and excessive" (Pet. App. 40a), particularly since the Board had ruled "that petitioners need not bargain on price-fixing" (Pet. App. 39a, n. 3; 41a).

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[4] The Trial Examiner found that the possibility that the Union might propose a "price-fixing" scheme did not impair its status as a labor organization under the Act, since petitioners could have adequately handled the matter "by saying nay to price fixing and aye to working terms and conditions" (Pet. App. 23a). He noted that the Board, in a companion case, had specifically held that any employer confronted with an unlawful "price-fixing" bargaining proposal "would be free to reject it and could not be compelled to do otherwise" (Pet. App. 25a, n. 5).

ARGUMENT

Petitioners' basic contention is that the election results were improperly influenced by the Union's statements that it would seek to incorporate in any collective agreement a price-fixing proposal which would violate the Sherman Act. Since the Board found, and the court below agreed, however, that there was no adequate basis in the record for concluding that these statements affected employee free choice, petitioners' contention raises essentially only an evidentiary issue which does not warrant further review. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 491.[5]

In any event, the Board was not unreasonable in declining to set the elections aside and certifying the Union as the representative of petitioners' employees. As the court below noted, there is no evidence as to how prominent the allegedly illegal proposals were in the overall campaign, no evidence of the number of employees to whom the proposals were communicated, and no indication of how long the proposals persisted after petitioners objected to the illegality of the scheme (Pet. App. 37a). Moreover, the pricing proposals

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[5] Judge Hastings' dissent is grounded not on the "general propositions of law relied upon by the majority," but rather on "their application to the facts of the case before us" (Pet. App. 41a). Thus, reading the record differently than did the Board and the court majority, he concluded that a sufficient showing had been made that the Union's price-fixing proposal had a significant effect on its organizational campaign and thus warranted setting the elections aside (Pet. App. 42a, 45a).

were put forth in January and February 1968, long before the elections were held, allowing the dealers ample time "to respond by pointing out any defects, legal or otherwise" (Pet. App. 38a).[6] Finally, since the Union had not as yet presented any proposal, legal or otherwise to petitioners and they were free to reject any that violated the Sherman Act, the Board properly refused to intrude upon the broad freedom which the Act accords employees in selecting a bargaining representative.

The case relied on by petitioners (Pet. 12), *Truck Drivers and Helpers, Local Union 568* v. *National Labor Relations Board*, 379 F. 2d 137 (C.A. D.C.), is clearly distinguishable. There, the union published on the day before the election material in which it promised to breach its duty of fair representation toward one group of employees. The court found that the union's promise of illegal action, coupled with the impact of that promise on the employees' freedom of choice in the election, amounted to coercion in violation of Section 8(b)(1)(A) of the Act. 379 F. 2d at 144. In the instant case, the assertedly illegal proposals took place many months before the election, and the employers had ample opportunity to counteract any coercive effect.

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[6] It was in this context that the court below stated that the record is devoid of "proof that the scheme won the election for the Union" (Pet. App. 37a). When read in context, it is clear that the court was not imposing a new standard (cf. Pet. 8), but merely registering its view, different from that of petitioners, that this "propaganda" did not affect the outcome of the elections.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 249

In the

Supreme Court of the United States

OCTOBER TERM, 1970

SCHMERLER FORD, INC., et al.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Solicitor General's contention that the Petition for Certiorari "raises only an evidentiary issue" is without validity:

It is not true that "the Board found * * * that there was no adequate basis in the record for concluding that these statements [as to price fixing] affected employee free choice." (Br. in Opp., p. 6.) *The Board never went into that subject.* On the contrary, the Regional Director, in his decision directing the elections held "Nothing in the [Labor] Act empowers the Board to pass judgment on whether the alleged anti-trust ramifications of a plan such as the one in question violates 'anti-trust' laws."

(App. 6a.) The Board refused to review that decision. (App. 18a.)

At no time, either in the underlying representation proceeding or in the ensuing unfair labor practice proceeding did the Board make the faintest finding that the price fixing promise did not affect employee free choice.

The Solicitor General has badly misread the record. The Board consistently refused to admit the illegality of the promise, much less its effect upon the election, while the majority of the Court of Appeals conceded the illegality of the promise but found, *all on its own*, that it did not affect the election.

Nor did the lead or concurring opinion in the Court of Appeals "agree" with a non-existent Board finding that these statements did not "affect" employee free choice. Those opinions promulgated the new doctrine that "There is no proof that the scheme won the election for the Union." (App. 37a.) That doctrine raises a basic legal, rather than a mere evidentiary, issue.

Proof that the scheme won the election could be made only by interrogating voters as to how they voted and why. The Brief in Opposition does not deny that such interrogation has been condemned by the Board and every Circuit that has passed on the question.

Finally, the Brief in Opposition refuses to face the question of whether it is proper for an agency of the Federal Government to lend its facilities for the incubation of a price fixing scheme.

The attempt to shrug off the Petition as raising an ordinary evidentiary issue flies in the face of the record. The Petitioner raises important questions of national policy.

Respectfully submitted,

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